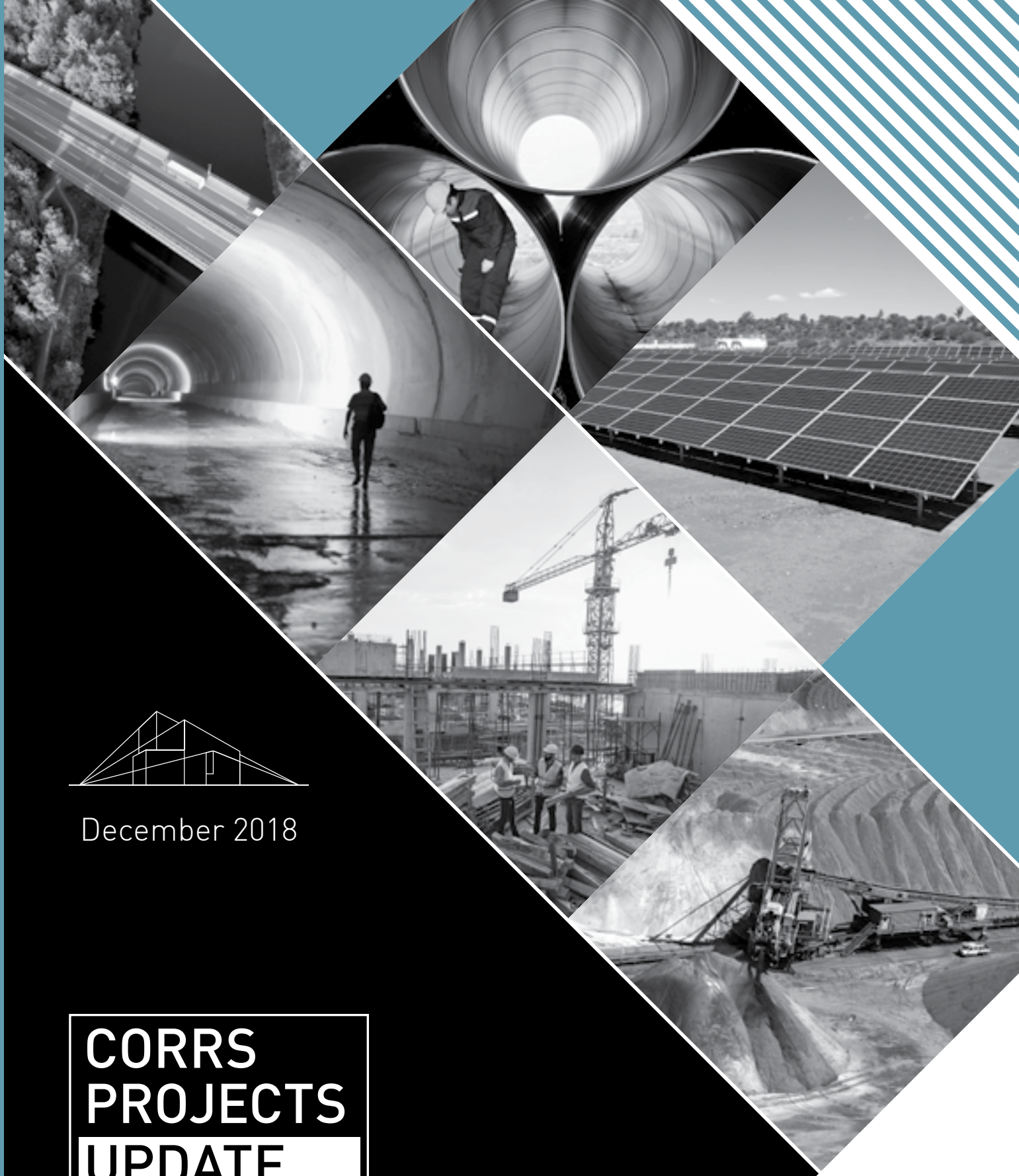

December 2018

CORRS PROJECTS UPDATE

CORRS CHAMBERS WESTGARTH
lawyers

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Welcome to the latest edition of Corrs Projects Update December 2018

This publication provides a concise review of, and commercially focussed commentary on, the major judicial and legislative developments affecting the construction and infrastructure industry in recent months.

We hope that you find it interesting and stimulating.

CORRS PROJECTS UPDATE

Our thinking

Corrs regularly publishes thinking pieces which consider issues affecting various sectors of the domestic and global economies. We have included at the end of this Update links to some of our recent thinking on issues affecting the construction industry.

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Contents

Hyundai Engineering & Steel Industries Co Ltd v Two Ways Construction Pty Ltd (No 2)

[2018] FCA 1551

CORRS PROJECTS UPDATE

Key takeaways

Under the International Arbitration Act 1975 (Cth), the Federal Court of Australia has the power to enforce foreign arbitral awards. The FCA also has the power to adjourn enforcement proceedings while separate proceedings to set aside, vary or suspend the foreign award are ongoing.[1]

The FCA will not enter judgment in the terms of the foreign award and grant liberty to apply to vary the enforcement order after the separate proceedings are resolved if liberty to apply would involve varying the FCA's original order.[2] While the FCA may make supplemental orders to align with the varied terms of the award, the grant of liberty to apply to vary or alter the initial order would be beyond the power of the Court as it would be inconsistent with the need for finality of litigation.

Keywords:

International arbitration; enforcement

Facts

Hyundai brought proceedings to enforce an international arbitral award obtained in Singapore against Two Ways (formerly Alfasi). Two Ways applied for an adjournment of the enforcement action, to permit it to pursue an application before the High Court of Singapore for a partial variation of the award. The adjournment was granted on the condition that Two Ways provide security for the full amount of the award.

Two Ways failed to provide the security. Subsequently, and before any determination was made by the High Court of Singapore, Two Ways went into voluntary administration.

Hyundai then applied for orders from the Federal Court of Australia (**FCA**) to proceed with the enforcement application, notwithstanding the voluntary administration, and for judgment to be entered in terms of the award. Two Ways' administrators consented.

Two Ways' administrators also sought liberty to apply to have the agreed orders varied, dependent on the outcome of the proceedings in Singapore.

Adjournment and decision

Enforcement application and adjournment

The parties agreed that the FCA's discretion to adjourn the enforcement proceedings under section 8(8) of the IAA had been engaged. The question for the Court concerned the principles guiding the exercise of that discretion. Those principles are set out in section 8(10).

O'Callaghan J noted that the Court has a wide discretion, but that that discretion must be understood in the context of the pro-enforcement bias of the Convention and the objects of the International Arbitration Act 1974 (**IAA**).

His Honour confirmed that it was not the FCA's role to embark on a detailed review of the merits of Two Ways' appeal, since Hyundai had accepted that Two Ways' case was at least arguable. On that basis, O'Callaghan J allowed the adjournment. His Honour noted, however, that the case for security was overwhelming, on the basis that evidence led by Two Ways as to its financial position was opaque, and because the orders sought from the High Court of Singapore were likely to mean Hyundai was still owed a substantial amount.

The decision

The parties agreed the Court should make orders enforcing the arbitral award and for judgment in terms of the award.

The issue was whether to grant a further order proposed by Two Ways' administrators: that the parties have liberty to apply to have the orders of the FCA varied, should the High Court of Singapore resolve to vary or set aside the arbitral award. The aim was to ensure consistency between the decision of the High Court of Singapore and the orders of the FCA.

His Honour observed that whether this order should be made turned on whether the proposed order contemplated the FCA making supplemental orders to align with the varied terms of the arbitral award, or whether what was proposed would involve the variation or alteration of the initial order. While the former may be permissible, the latter would beyond the Court's power.

Notably, rule 39.05 of the Federal Court Rules 2011 (Cth) provides that the Court may make orders to vary or set aside a judgment or order in prescribed circumstances. Beyond this, as a general proposition, the Court will not vary or set aside initial orders, given the need for finality in litigation.[3]

A supplemental order is one that is related to the previous orders and is incidental to, or in aid of, the enforcement of those orders. His Honour referred, as an example, to the decision in *Remington Products Australia Pty Ltd v Energizer Australia Pty Ltd*.[4] There, the Court considered that orders for the removal of batteries from public display were properly supplemental to orders that permanently restrained Energizer Australia from distributing or making particular representations about batteries.

His Honour considered that once the Court had made the orders sought by consent, namely to enforce the award and give judgment in its terms, the Court had no jurisdiction to vary those orders. This extended to rule 39.05, in the event that the High Court of Singapore were to vary the award. Any change to the form of the order consented to could not be described as supplemental to the proposed order. Rather, it would amount to liberty to apply to vary or alter the initial order of the Court. This would be beyond the Court's power. Accordingly, O'Callaghan J refused to grant the proposed order for liberty to apply.

Finality of the judgment

The parties also made submissions on the proposition that the entry of the final judgment, and the right to it, is based on the applicant's contractual right to the payment of the award. It was submitted that this final judgment conclusively determines the applicant's rights in Australia, and that any subsequent determination by the High Court of Singapore to vary or set aside the award would be irrelevant.

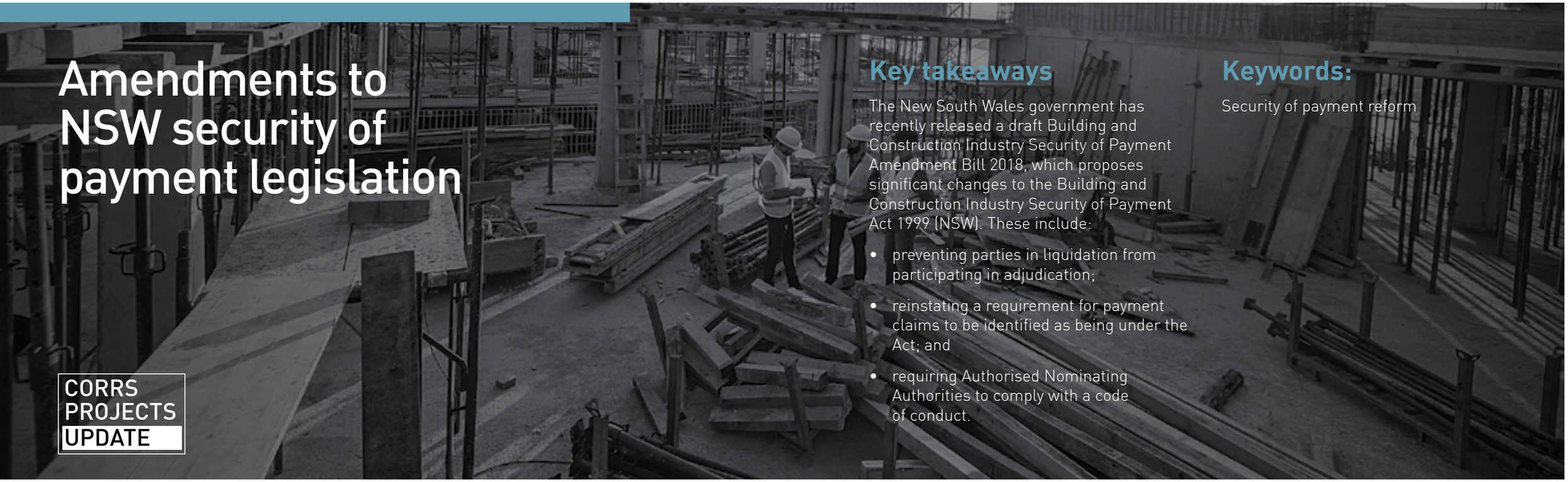
Having taken the view that the Court did not have the power to do what the proposed order for liberty contemplated, his Honour deemed it unnecessary to deal with the additional submissions.

http://www.judgments.fedcourt.gov.au/judgments/Judgments/fca/single/2018/2018fca1551

1 International Arbitration Act 1975 (Cth), sections 8(1), (3) and (8)
2 *Hyundai Engineering & Steel Industries Co Ltd v Two Ways Construction Pty Ltd (No 2)* [2018] FCA 1551 at [18]
3 His Honour referred to the decision in *Caboolture Park Shopping Centre Pty Ltd (In Liquidation) v White Industries (Queensland) Pty Ltd* (1993) 45 FCR 224
4 (2008) 246 ALR 113

Amendments to NSW security of payment legislation

CORRS PROJECTS UPDATE



Key takeaways

The New South Wales government has recently released a draft Building and Construction Industry Security of Payment Amendment Bill 2018, which proposes significant changes to the Building and Construction Industry Security of Payment Act 1999 (NSW). These include:

- preventing parties in liquidation from participating in adjudication;
- reinstating a requirement for payment claims to be identified as being under the Act; and
- requiring Authorised Nominating Authorities to comply with a code of conduct.

Keywords:

Security of payment reform

Background

The proposed reforms to the Building and Construction Industry Security of Payment Act 1999 (NSW) (**Act**) come in the wake of two inquiries into construction practices. The NSW government launched an Independent Inquiry into Construction Industry Insolvency (**Collins Inquiry**), which looked into payment practices in the construction industry after a wave of construction companies went insolvent. The Commonwealth government released the final report of the Review of Security of Payment Laws (**Murray Review**), which examined similar features but on a national level. One of the key recommendations of the Murray Review was the need for consistency in security of payment laws across Australia. The amendments proposed in the draft Building and Construction Industry Security of Payment Amendment Bill 2018 (**Bill**) seek to implement some of the recommendations of the Murray Review.

Proposed Changes

Parties in liquidation not to benefit from Act	Companies in liquidation will not be able to make a payment claim, apply for an adjudication, or enforce an adjudication determination. The rationale for this amendment is that: • a liquidated business no longer requires cash flow to run; and • any payment made would effectively be final, with no ability to argue its merit later. The amendment would also resolve a recent conflict between the Supreme Court of NSW (which held that liquidated companies could make a payment claim) and the Victorian Court of Appeal (which held they could not).
Payment claims must be labelled	The Bill would reinsert the requirement that a payment claim must be endorsed under the Act in order to enliven the statutory payment regime. This requirement was reinserted despite the Collins Inquiry concluding that it led to under-utilisation of the Act by subcontractors. Industry feedback has indicated that, without this requirement, there is the potential for uncertainty about whether the Act applies. This will be a significant development for jurisdictions, like Queensland, that are considering following NSW's current position and removing the requirement for endorsement.
Time for payment reduced	Unless an earlier date is specified in the contract: • principals will have to pay head contractors within 10 business days from the date a payment claim is made (currently 15 business days); and • head contractors will have to pay subcontractors within 20 business days from the date a payment claim is made (currently 30 business days).
Change in timing for determination	An adjudicator will have 10 business days to make a determination after receiving the adjudication response. Currently, an adjudicator must make a determination within 10 business days after they notify the parties of their acceptance. A claimant will now also be able to withdraw an adjudication application any time before the determination.
Entitlement to progress payments expanded	The definition of *"reference date"* has been changed to provide for a minimum entitlement to a progress payment of at least once per month for work done that month (with some exceptions). This was done to more effectively meet the Act's objective of promoting cash flow. An entitlement to a final progress payment after termination will also be introduced. This will discourage the practice of terminating contracts before a reference date to prevent a final payment claim being made under the Act.
Supreme Court may partially sever and remit adjudication determinations	Currently, an adjudicator's jurisdictional error generally results in the entire adjudication determination being declared void. The proposed amendment would enable the Supreme Court to sever the part of the adjudicator's determination affected by a jurisdictional error but enforce the balance of the determination. The Supreme Court would also be allowed to remit the matter (in whole or in part) back to the adjudicator for redetermination.
Code of practice for Authorised Nominating Authorities (ANAs)	ANAs will be required to comply with a Code of Practice, a contravention of which could result in the ANA's authority to nominate adjudicators being withdrawn, a penalty of up to 50 penalty units (which currently equates to $5,500) or both.

New South Wales

Threshold for trust requirements reduced	Head contractors working on construction projects valued at $10 million or more (reduced from $20 million) will be required to pay retention money into a trust account for their subcontractors. This is designed to create greater certainty for subcontractors by capturing a larger pool of head contractors. Subcontractors will be able to inspect the head contractor's retention money trust account records regarding the retention money held on trust for them.

For more information, see:

- the draft Bill — https://www.fairtrading.nsw.gov.au/__data/assets/pdf_file/0009/396513/Exposure-draft-Bill-Building-and-Construction-Industry-Security-of-Payment-Amendment-Bill-2018.PDF; and
- the explanatory statement — https://www.fairtrading.nsw.gov.au/__data/assets/pdf_file/0008/396521/Explanatory-Statement-Building-and-Construction-Industry-Security-of-Payment.PDF.

Owners of Strata Plan 80458 v TQM Design & Construct Pty Ltd [2018] NSWSC 1304

CORRS PROJECTS UPDATE

Key takeaways

When a plaintiff seeks compensation for defective building work, the plaintiff must prove that the defendant was responsible for the building work. This may cause problems where a second contractor takes over the works.

In NSW, there is no role for the theory of "temporary disconformity", which could see any defective building work treated as a "temporary disconformity" rather than a breach of contract while the builder still has the opportunity to remedy it.

A plaintiff must not be overcompensated for its loss. This may cause problems where there are multiple defendants and a settlement with one of them is for a global amount.

Keywords:

Defects, temporary disconformity theory

Facts

This case was about defective building work on a luxury residential apartment building on Sydney's Northern Beaches.

TQM Design & Construct Pty Ltd (**TQM**) had built a significant part of the building for the property developer, PVD No.16 Lagoon Street Pty Ltd (**PVD**). However, during the construction phase, TQM suspended building works over an unpaid payment claim of over $2,500,000. PVD responded by alleging breaches of contract in wrongfully suspending works and failing to proceed with due expedition and without delay. While there was no evidence of any formal termination, the parties agreed that at some stage the contract was terminated.

PVD subsequently engaged Intek Solutions Pty Ltd (**Intek**) to complete the works. Intek, however, was placed into liquidation on 9 September 2009. AAI was their home building insurer.

In turn, PVD was deregistered in January 2012, following a creditors' winding up application.

It was not until 2016 that the plaintiffs and the insurer AAI reached a settlement. As a result of this settlement, TQM became the sole defendant, with the main issue for the Court being whether TQM had breached warranties under section 18B the Home Building Act 1989 (NSW) (**Act**), which requires that building work be performed in *"a proper and workmanlike manner and that all materials supplied will be good and suitable for the purpose for which they were used"*.

Issue 1 — Defects

The plaintiffs claimed damages from TQM for breaches of warranty under section 18 of the Act.

While the plaintiffs originally made several complaints against TQM, their inability to prove that TQM (rather than Intek) had undertaken the defective work meant only three complaints were considered by the Court. These disputes concerned plasterboard and acoustic problems arising from air-conditioning and plumbing.

The plaintiffs bore the onus of showing that TQM did the work, that the work was defective, and that the plaintiffs suffered particular loss as a result.[1] Broadly, the plaintiffs were unable to show where TQM's work finished and Intek's work began, and there were further problems of proving loss. The case is a useful reminder of the fundamentals of proving a claim, especially where many years pass between the building work and disputes about it.

Issue 2 — Temporary Disconformity Theory

TQM attempted to defend against the plaintiffs' claims of breaches of warranty by invoking the principle of *"temporary disconformity theory"*, which is the idea that action against a builder for defective work cannot be taken if that builder still has the opportunity to remedy that defective work.[2] A builder continues to have the opportunity to remedy defective work at any time before work is completed and handed over to the owner, and perhaps during any defects liability period. Under this theory, until this opportunity to remedy defective work passes, the defective work should be treated as merely a temporary disconformity with the contract, and not a breach of it.

TQM argued that it was denied the opportunity to remedy any defects on the basis PVD took the work out of its hands unlawfully by ending the contract, and therefore the defects were only temporary and not TQM's fault. An element of this contention is that if TQM had been given the opportunity to rectify defects, it would have.

Hammerschlag J strongly rejected this argument, holding *"there is no such rule of law"* in NSW, and no such principle was ever espoused in the precedent raised by TQM.[3]

Issue 3 — Double Compensation

Where a plaintiff with concurrent claims against multiple parties has actually recovered all or part of their loss from one of them, that recovery reduces the amount of damages they can be awarded from other parties.[4] A plaintiff cannot recover more than the total sum they are owed due to the defective work: double recovery is not permitted. This has special consequences for settlements.

The plaintiffs had already signed a deed of settlement with the insurer, AAI, for $1,100,000 when these proceedings commenced. TQM argued that under the deed of settlement, the plaintiffs received compensation from AAI for loss or damage in respect of the air-conditioning and drainage and sanitary pipework claims, so further claims against TQM would be an impermissible attempt at double recovery. The claims against TQM for air-conditioning and acoustic defects were made in the same terms against AAI and were part of the claims settled between the parties.

The deed of settlement did not apportion any amounts to any particular defects. As the plaintiffs made no submissions relating to the amount of compensation already received from AAI for the cost to remedy the air-conditioning and acoustic defects, Hammerschlag J found that both these defects had been paid for in full by the AAI settlement. No further compensation could be sought from TQM due to the double compensation rule.[5]

Conclusion

The proceedings were dismissed, and the plaintiffs were ordered to pay TQM's costs.

https://www.caselaw.nsw.gov.au/decision/5b7cffcee4b06629b6c615f2

1 At [77]
2 Lord Diplock in *P & M Kaye Ltd v Hosier & Dickinson Ltd* [1972] 1 All ER Rep 121 (HL)
3 At [178]
4 *Townsend v Stone Toms & Partners* (1984) 27 BLR 26 at 89 (Oliver and Purchase LLJ)
5 At [224]–[225]

The Owners – Strata Plan No 66375 v King

[2018] NSWCA 170

CORRS PROJECTS UPDATE

Key takeaways

Developers may be liable for defects that contravene statutory warranties, even if the defects do not relate to the actual work undertaken by the builder engaged by the developer.

Keywords:

Statutory warranties; design defects; notional contracts

Facts

The Kings engaged Beach Constructions Pty Ltd (**Builder**) to convert a warehouse into a mixed residential and commercial strata development. The contract only covered construction and contained no design obligations. After the development was completed, the Kings sold the property and the Owners Corporation became the immediate successor in title to the common property. It was only after the sale that design defects were discovered. These defects arose because of errors in the design plans and specifications, not the builder's construction work, which was completed in accordance with those plans and specifications.

Section 18C of the Home Building Act (**Act**) creates a contract between the developer of the building works and the immediate successor in title, such as the Owners Corporation here. This is referred to as a notional contract. The effect is that the successor is treated like the original contracting party, and so benefits from the statutory warranties under the Act.

The Owners Corporation sued the Kings, alleging they had a notional contract under section 18C of the Act and that this contract included the statutory warranties in section 18B. This was relevant because section 18B(c) requires works to be done in accordance with law. It was not contested that the design defects contravened the Building Code of Australia.

The issues for the Court were (1) whether the Kings were the developers, and (2) what the scope of the notional contact was.

NSW Supreme Court

Ball J held the Kings were not liable as they failed to satisfy a threshold test in section 18C as the Kings were not defined as developers under section 3A of the Act. In any event, Ball J noted in obiter that even if there were a section 18C notional contract, it would not extend to the statutory warranties that related to the design defects as these were outside the Builder's scope of works.

NSW Court of Appeal

The Owners Corporation appealed the decision. The majority overturned Ball J's decision and held the Kings were party to a notional contract and that it included the statutory warranty in section 18B(c) of the Act.

Threshold issue — Were the Kings "developers" under section 3A?

The full bench held the Kings were developers for the purposes of the Act. Ward J (Leeming and White JJA agreeing) held that the Kings were persons "on whose behalf" the building work was done. This decision turned on the facts of the project.

Issue 1 — Construction of section 18C and scope of the notional contract

White, Leeming and Ward JJA all considered that section 18C created a notional contract.

White and Leeming JJA agreed with Ball J and considered that the terms of the notional contract were defined and limited the contract between the developer and the builder. Leeming JA emphasised the counterfactual drafting in the legislation that states the successor in title will be entitled to make this restriction "as if" they were the developer.

Ward JA by contrast considered that the contract between Owners Corporation and the Kings was wider than the scope of the contract between the builder and developer. Her Honour relied on three examples. First, section 18C referenced the four categories of persons who might be party to a notional contract (an owner-builder, a holder of a licence, a former holder and a developer). Second, section 18C is not predicated on the existence of an actual contract. Third, Ward JA considered cases in which a developer may be liable to an owners corporation for a decision about design and planning, even though the builder was not at fault.

Issue 2 — Relevant statutory warranties and the notional contract

White and Ward JJA agreed that the statutory warranty in section 18B(c) formed part of the notional contact, but for different reasons. Lemming JA dissented on this point.

White JA held that section 18B(c) makes the builder liable where the works are in breach of any law, even if that breach arose from work that is beyond the builder's scope under its construction contract. As such, White JA found the Kings were liable for the design defects, but only because the Builder could also be found liable for the same defects under its construction contract with the Kings.

Ward JA determined that a developer's liability for breaching statutory warranties extends to all work done on behalf of the developer, not just those works done under the contract with the builder. As such, the Kings were liable for the design defects, notwithstanding that these works were beyond the scope of the actual building contract between the Kings and Builder.

Leeming JA held in dissent that the warranty under section 18B(c) cannot be implied into a contract for building works only as this would require the builder to identify and rectify defects in designs that it had not been engaged to prepare.

Recent amendments to the Home Building Act

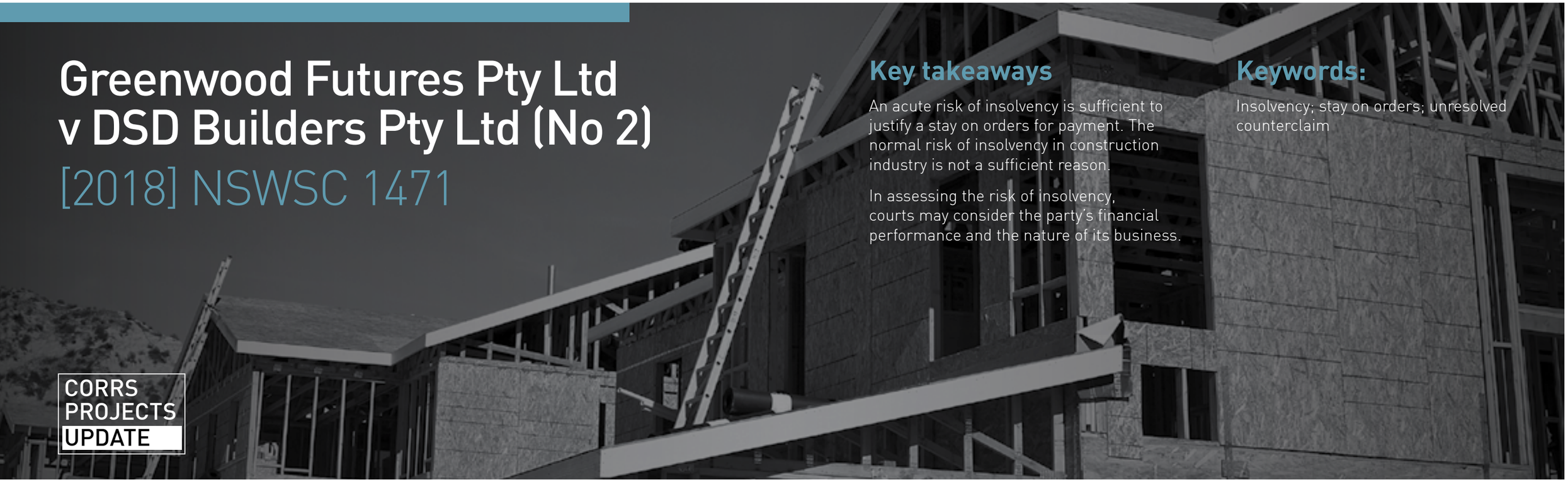
Section 18F(1)(b) of the Act now provides a statutory defence for contracts executed after 2014. This defence allows developers and builders to reasonably rely on a relevant professional (such as an architect) engaged by the defendant to do the work. This defence may have aided the Kings under Ward and White JJA's reasoning.

Conclusion

The scope of the notional contract remains somewhat uncertain. Ward and White JJA found reason to rely on the statutory warranties, albeit through different mechanisms. Either way, builders and developers must appreciate that both the actual contract and the notional contract with successors in title will include these statutorily imposed warranties. Both may potentially be liable for breaches of warranties which relate to work done outside the scope of their construction contract.

https://www.caselaw.nsw.gov.au/decision/5b60efabe4b0b9ab4020e403

Greenwood Futures Pty Ltd v DSD Builders Pty Ltd (No 2) [2018] NSWSC 1471



CORRS PROJECTS UPDATE

Key takeaways

An acute risk of insolvency is sufficient to justify a stay on orders for payment. The normal risk of insolvency in construction industry is not a sufficient reason.

In assessing the risk of insolvency, courts may consider the party's financial performance and the nature of its business.

Keywords:

Insolvency; stay on orders; unresolved counterclaim

Background

Greenwood Futures (**Greenwood**) had engaged DSD Builders (**DSD**) to build some townhouses in Jesmond. In the initial litigation, DSD made a successful claim against Greenwood for non-payment. The Court ordered Greenwood to pay DSD $220,000, subject to a temporary stay of orders. Concurrent with DSD's successful claim, Greenwood counterclaimed a sum greater than what it was ordered to pay DSD. Greenwood thus applied for a stay of the order to pay DSD while Greenwood made its counterclaim.

Issue

Greenwood's claim to continue the stay of orders was made on the basis that DSD's acute risk of insolvency jeopardised the chance that any damages in a successful counterclaim would be paid. Greenwood pointed to evidence of DSD's financial performance, its course of conduct in its business dealings and its failure to respond to Greenwood's evidence in the counterclaim.

Decision

In a decision ex tempore, McDougall J extended the stay. His Honour based the decision on a two-stage evaluation:

1 defining the threshold of insolvency risk required to justify a stay; and

2 assessing which factors contributed to the contractor's insolvency risk.

The stay of orders was continued because the contractor's financial performance and the nature of its business activities credited it with a greater than normal risk of insolvency.

Issue 1 — Threshold insolvency risk required to justify a stay

McDougall J reaffirmed that the general risk of insolvency that is characteristic of doing business in the construction industry was insufficient to justify a stay of orders preventing due payment under the Building and Construction Industry Security of Payment Act 1999 (NSW). The correct threshold is where the threat of insolvency creates a very real risk that a successful counterclaim will not result in due payment.

Issue 2 — Relevant insolvency risk factors

McDougall J assessed three factors to determine whether there was an increased risk of insolvency.

1 Financial performance

McDougall J held that DSD's failure to provide clear, up-to-date statements disadvantaged its defence. While its financial position was not conclusively found to be in jeopardy, anomalies in its financial statements cast doubt. In DSD's balance sheet, the proceeds of a share issue were not properly recorded. Further, its income statement showed no provision for tax, making a value of net profit hard to determine. The burden of proving financial health was placed in part on the defendant, at least to the degree that accurate information should be admitted to the courts as soon as possible.

2 History of business conduct

Evidence implied that DSD's principals had engaged in "phoenix practices" whereby companies were liquidated to avoid commitments to creditors and new ones created in their place. Furthermore, DSD had not paid its subcontractors for work. McDougall J held that this evidenced it was structuring its business affairs so as to avoid paying creditors.[1]

3 Lack of submissions to rebut the counterclaim

Greenwood submitted that DSD's failure to answer evidence in the counterclaim indicated an increased risk that, should Greenwood succeed, it would not receive the money it would be owed. However, McDougall J declined to consider the merits of the counterclaim as reason to justify a stay.

Conclusion

The Court was satisfied that DSD's risk of insolvency was greater than normal. On that basis, the Court extended the stay on the order for Greenwood to pay DSD until Greenwood's counterclaim was resolved. McDougall J also referred to Greenwood's undertaking to prosecute its counterclaim. His Honour reserved the liberty to discharge the stay on short notice should circumstances change.

https://www.caselaw.nsw.gov.au/decision/5badd282e4b0b9ab4020fdaf

1 See [13]–[15]

Cragcorp Pty Ltd v Qld Civil Engineering Pty Ltd [2018] QSC 203

CORRS PROJECTS UPDATE

Key takeaways

An adjudication decision under the Building and Construction Industry Payment Act 2004 (Qld) (**BCIP Act**) will only be void for jurisdictional error.

This case confirms that jurisdictional error will arise where adjudicators have not performed their functions under the BCIP Act. However, such errors are unlikely to arise merely because the adjudicator fails to provide detailed reasons.

Keywords:

Jurisdictional error

Facts

Brisbane City Council engaged Cragcorp Pty Ltd to replace a bridge over Wolston Creek. Cragcorp engaged Qld Civil Engineering Pty Ltd (**QCE**) as a subcontractor for this work.

When QCE commenced work, it encountered rock about 4 metres below the surface. The geotechnical information provided by Cragcorp indicated that the rock began at a depth of 10 metres. QCE submitted two variation claims based on latent conditions.

QCE lodged a payment claim of $250,649 under the BCIP Act. Cragcorp responded with a payment schedule for $49,016 on the basis that it accepted the variations but set off amounts for liquidated damages and cash retention. In its adjudication application, QCE later reduced its claimed amount to reflect the cash retention required by the contract. In Cragcorp's adjudication response, it claimed for the first time that QCE was not contractually entitled to the variations.

The adjudicator required Cragcorp to pay QCE the $205,218, thereby accepting the entitlement to the variations and denying the liquidated damages claim.

Declaratory relief sought from the Supreme Court

In the Supreme Court, before Lyons SJA, Cragcorp sought a declaration that the adjudication decision was void due to jurisdictional error. It argued two primary grounds:

1. The adjudicator failed to perform the statutory task required by the BCIP Act; and
2. The adjudicator denied Cragcorp natural justice and did not give proper written reasons.

On the first ground, Cragcorp argued that the adjudicator failed to apply the contract in assessing the payment claim because there was no provision under the contract for payment for latent conditions, and further, that the adjudicator had given no reasons for accepting the claims. Lyons SJA held that there was no jurisdictional error based on this matter. The question is not whether the Court would have come to the same conclusion but whether the adjudicator performed the functions required by the BCIP Act. Lyons SJA considered that the Adjudicator had sufficiently identified a legal entitlement for the variations:

> *"The adjudicator clearly considered the terms of the contract and the requirements of the legislation … (and) was entitled to disregard any new reasons submitted for the first time in the Payment Schedule in that context."*[1]

On the second ground, Lyons SJA determined that Cragcorp had not been denied natural justice. Cragcorp argued that it was denied natural justice because of the adjudicator's interpretation of the contract and also because the adjudicator did not allow Cragcorp to make further argument for a different conclusion. This specifically concerned liquidated damages. The adjudicator had decided this was a "good faith" contract and that there was no evidence of Cragcorp's losses because the project was late, and that Cragcorp was therefore not entitled to liquidated damages.

Lyons SJA held that a denial of natural justice must be *"substantial"*. His Honour determined that there was no substantial denial of natural justice as Cragcorp had the opportunity to make submissions and had done so. His Honour identified that even if further submissions were provided, "there is no evidentiary basis to conclude that the adjudicator would have made a different decision."[2]

There was evidence throughout the contract to support QCE seeking extensions of time due to latent conditions.

In relation to the alleged lack of sufficient reasons for the decision, Lyons SJA held that the adjudicator had complied with the requirements of section 26(3) of the BCIP Act. His Honour stated that although the reasons were brief, there is no need for there to be *"precision in relation to every factual matter"*.[3] His Honour found that the reasons indicated that the adjudicator had considered all the material she was required to and had given a clear conclusion on each of the issues.

https://www.sclqld.org.au/caselaw/QSC/2018/203

1 At [74]
2 At [90]
3 At [96]

The Building Industry Fairness (Security Of Payment) Act 2017 (Qld) – Where Are Things At?

CORRS PROJECTS UPDATE

In October 2017, the Queensland Government passed the Building Industry Fairness (Security of Payment) Act 2017 (Qld) (Act).

Our updated guide to the Act covers the current status of the Act – some of which will commence on 17 December 2018 – and also outlines some recent amendments to the Act.

The key changes made by the Act are summarised in the attached fact sheets:

1. The introduction of Project Bank Accounts (**PBAs**) for certain construction projects. Read more in this fact sheet.
2. The amendment and consolidation of the Building and Construction Industry Payments Act 2004 (Qld) (**BCIPA**) and Subcontractors' Charges Act 1974 (Qld) (**SCA**). **This will commence on 17 December 2018**. Read more in this fact sheet.
3. Amendments to the Queensland Building and Construction Commission Act 1991 (**QBCC Act**). Read more in this fact sheet.
4. The introduction of penalty provisions to enforce compliance with the Act.

PBAs for private sector building contracts

On 1 March 2018, the PBA regime commenced for contracts where:

- the principal is the State or a 'State authority';
- the contract price is between $1 million and $10 million; and
- more than 50% of the contract price is for 'building work' (known as Phase 1).

The PBA provisions will in future be extended to all building contracts over $1 million (known as Phase 2).

PBAs are not be required for:

- building contracts only for residential construction work (unless the Department is the principal and the work is for three or more living units);
- maintenance work;
- subcontracts;
- the construction, maintenance or repair of a busways, roads or railways (or tunnels for that infrastructure); or
- an authorised activity for a resource activity.

The legislation provides that the Phase 2 provisions will commence on a date to be proclaimed. We expect that date to be 1 March 2019, as it was originally contemplated that Phase 2 would commence 12 months after Phase 1.

Amendments to the BCIPA, the SCA and the QBCC Act

Amendments to BCIPA and the SCA will commence on 17 December 2018. The commencement of the remaining amendments to the QBCC Act has yet to be proclaimed.

Recent amendments to the BIF Act

A number of changes to the Act were passed in the Plumbing and Drainage Act 2018 (Qld) to address industry feedback and to ensure that industry participants understand their obligations under the new Act. These recent changes have also been addressed in the fact sheets referred to earlier.

Hurdsman v Ekactrm Solutions Pty Ltd

[2018] SASC 112

CORRS PROJECTS UPDATE

Key takeaways

An application to stay proceedings on the basis that there was a binding arbitration agreement was refused where the dispute resolution clause referred disputes to a mediator, whilst seeking to incorporate the rules of the Singapore International Arbitration Centre, which do not include mediation rules. The Court found that the clause *"is neither this nor that, that is to say it is not quite an arbitration agreement and not quite a mediation agreement"*.

The case highlights the need for lawyers to know arbitration and mediation rules, and is yet another warning that courts will be reluctant to construe meaning from poorly drafted contracts. In this situation, an application for rectification of the contract may have produced a better outcome for the party seeking dispute resolution by arbitration.

Keywords:

Dispute resolution clauses

Facts

Hurdsman and others (**plaintiffs**) sought damages for a breach of the Share Sale Agreement (**SSA**) it entered into with Ekactrm Solutions Pty Ltd (**defendant**) in June 2013. The plaintiffs were the sellers of shares valued at approximately $5.8 million and the defendant was the buyer.

The plaintiffs sued, alleging the defendant had breached the SSA, but the defendant filed an interlocutory application seeking a permanent stay of proceedings on the ground that the parties were subject to a binding agreement to arbitrate under clause 28.3 of the SSA. That clause provided:

> *"If the parties have been unable to resolve the Dispute within the Initial Period, then the parties must submit the Dispute to a* **mediator for determination in accordance with the Rules of the Singapore International Arbitration Centre (Rules), applying South Australian law**, *which Rules are taken to be incorporated into this agreement."* (emphasis added)

There are no Singapore International Arbitration Rules (**SIAC**) rules for mediation. The defendant contended that it was plainly obvious on the face of the clause that the word "mediator" was a typographical error and should have read "arbitrator".

Clause 28.4 of the SSA stated:

> *"A party may not commence court proceedings in respect of a Dispute unless it has complied with this clause 28 and until the procedures in this clause 28 have been followed in full, except where:*
>
> *28.4.1 the party seeks injunctive relief in relation to a Dispute from an appropriate court where failure to obtain such relief would cause irreparable damage to the party concerned; or*
>
> *28.4.2 following those procedures would mean that a limitation period for a cause of action relevant to the issues in dispute will expire."*

Clause 29 prescribed that the contract was to be governed by the laws of South Australia and each party submitted to the non-exclusive jurisdiction of the South Australian and Commonwealth courts.

In making its argument, the defendant drew the Court's attention to the following facts. First, prior to entering into the SSA, the plaintiffs and a party related to the defendant, Eka Software Solutions Private Limited (**India**), entered into a memorandum of understanding (**MOU**) which clearly nominated arbitration as the dispute resolution mechanism. It stated:

> *"Subject to sub-clause b above, any Dispute shall be referred to and finally resolved by* ***arbitration*** *in accordance with the rules of the* ***SIAC*** *applying South Australian law"* (emphasis added).

Secondly, after the plaintiffs served their dispute notice, the parties negotiated proposed venues for an arbitration.

However, the correspondence between the parties regarding proposed arbitration venues was post-contractual. Evidence of it may have been admissible if the defendant was seeking rectification of the SSA, but not when considering, as a matter of interpretation of the SSA, whether the parties were subject to a binding agreement to arbitrate.

Decision

The defendant relied on the principle that the court will decline to apply a literal meaning if it leads to an absurd result. In *Fitzgerald v Masters*, Dixon CJ and Fullagar J found that words may be supplied, omitted or corrected in order to avoid absurdity or inconsistency.[1] The defendant also cited *Westpac Banking Corp v Tanzone Pty Ltd*, where a clause in a lease was corrected because it provided for rental reviews based on the rate of inflation, but the formula led to increases that far outstripped inflation.[2]

The Court found that clause 28.3 was ambiguous. This was because the requirement that mediation be conducted in accordance with the rules of SIAC is not consistent with an intention to resolve the dispute by mediation. The Court attempted to resolve the ambiguity in the clause and determine the intentions of the parties by having regard to the SSA itself, the pre-contractual negotiations and, to a limited extent, the terms of the MOU.

The Court analysed all five of the draft iterations of the SSA. Clause 28.3 was inserted into the SSA in its first draft and remained unchanged throughout the contract negotiations. While the MOU plainly contained a reference to arbitration, the Court found the parties' position had changed by the time the SSA was drafted. The Court found that instead of mirroring the language in the MOU, clauses 28 and 29 in the SSA were very different from the dispute resolution clause in the MOU.

The Court noted that it was likely that clause 28.3 was contextually more coherent as a mediation agreement than an arbitration agreement. This was because the Court read clauses 28 and 29 as contemplating that a dispute would be amenable to court proceedings.

1 *Fitzgerald v Masters* (1956) 95 CLR 420

2 *Westpac Banking Corporation v Tanzone Pty Ltd* (2000) 9 BPR 17, 521; but compare *Marks and Spencer plc v BNP Paribas Securities Services Trust Company (Jersey) Limited* [2015] UKSC 72

The Court found that if clause 28.3 was an arbitration clause, then clause 28.4 (set out above) and clause 29 (a jurisdiction clause) were redundant. The Court's reasoning was that if the parties were required to arbitrate under clause 28.3, there would be no need for the other proceedings to determine a dispute as contemplated by those clauses.

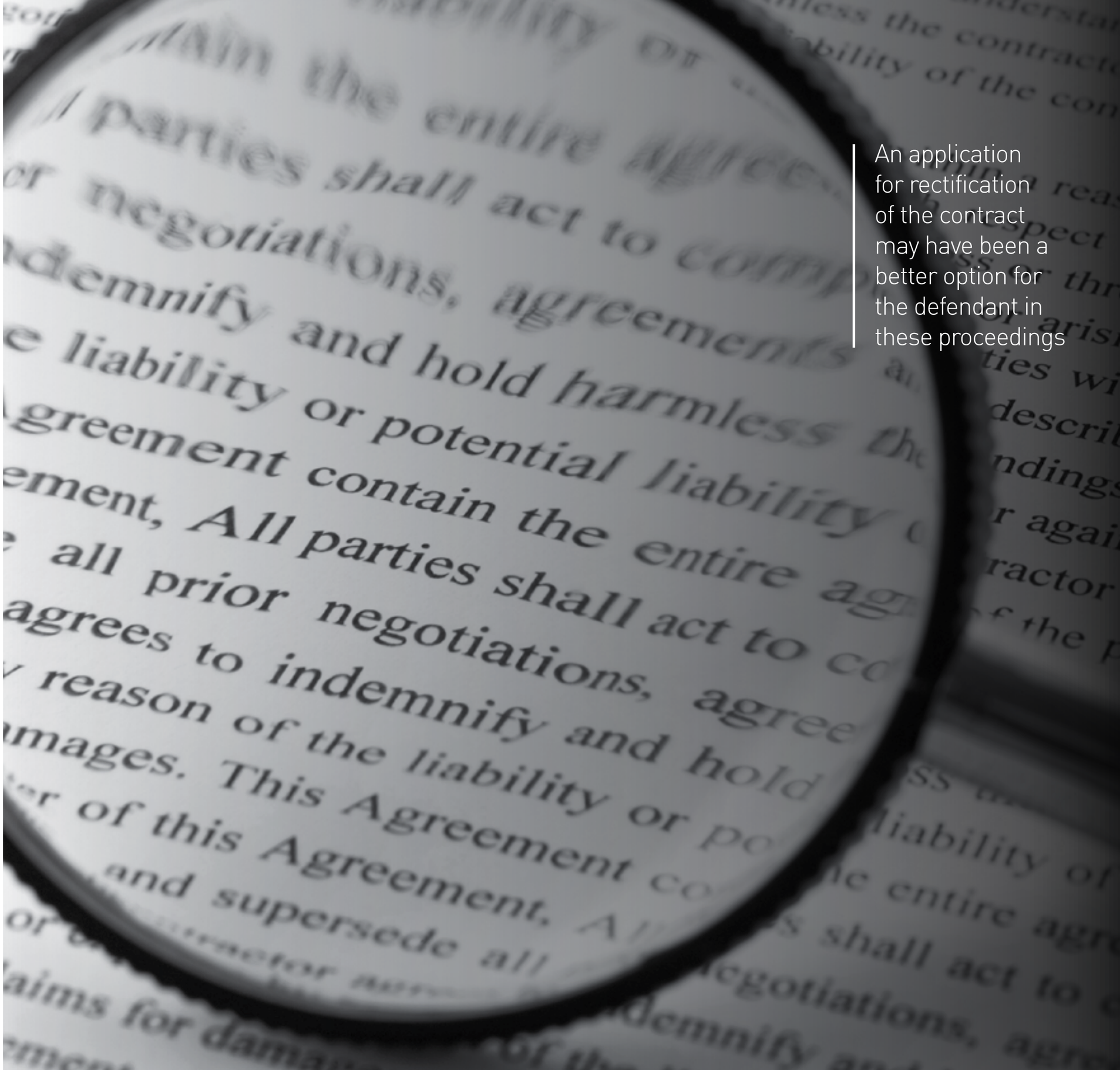
The Court ultimately found that *"clause 28.3 is neither this nor that, that is to say it is not quite an arbitration agreement and not quite a mediation agreement."*[3] The Court dismissed the defendant's application for a stay of proceedings.

Conclusion

An application for rectification of the contract may have been a better option for the defendant in these proceedings.[4] Here, post-contractual communications revealed both parties thought arbitration was the dispute mechanism after the dispute notice was filed, but these communications were not relevant to a construction of the SSA, and ultimately the stay application failed.

As international commercial dispute resolution grows, it is essential that dispute resolution clauses be unambiguously drafted, and that lawyers know the relevant arbitration and mediation rules intricately.

http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/sa/SASC/2018/112.html



An application for rectification of the contract may have been a better option for the defendant in these proceedings

3 *Hurdsman v Ekactrm Solutions Pty Ltd* [2018] SASC 112 (10 August 2018) at [30]
4 Consider *Simic v New South Wales Land and Housing Corporation* [2016] HCA 47

Hansen Yuncken Pty Ltd v Yuanda Australia Pty Ltd

[2018] SASC 158

CORRS PROJECTS UPDATE

Key takeaways

The criteria in section 22(5) of the Building and Construction Industry Security of Payment Act 2009 (SA) (**Act**), which permit an adjudicator to correct errors, mistakes or miscalculations in an adjudication determination, do not give rise to jurisdictional facts. This is consistent with case law in New South Wales and Queensland.

Failure to record amounts and arguments accurately throughout the security of payment process may mean they are not in issue before the adjudicator.

Keywords:

Security of payment; jurisdictional facts; jurisdictional errors

Facts

Hansen Yuncken Pty Ltd and CPB Contractors Pty Ltd (together **HYLC**) engaged Yuanda Australia Pty Ltd (**Yuanda**) to undertake façade works as part of HYLC's construction of the new Royal Adelaide Hospital. There were delays in the project and HYLC sought to impose liquidated damages on Yuanda.

HYLC imposed liquidated damages of $6,483,947, which was the cap on liquidated damages under the contract. It called on bank guarantees for $4,420,873 in part payment of the liquidated damages. (At adjudication, HYLC asserted that Yuanda still owed HYLC $2,063,074 for liquidated damages.)

Yuanda served a payment claim on HYLC seeking payment of $7,763,159. HYLC responded with a payment schedule pursuant stating that the amount owing was negative $592,029. Yuanda then applied for adjudication. The adjudicator determined that HYLC pay Yuanda $1,905,069.

Although the adjudicator rejected Yuanda's submission that HYLC had no right to liquidated damages under the contract, he only took into account the $4,420,873 recovered under the bank guarantees, rather than the $6,483,947 claimed. HYLC wrote to the adjudicator alleging that he had made an error in his calculations by failing to take into account the unpaid liquidated damages. It asked the adjudicator to correct the error using section 22(5) of the Building and Construction Industry Security of Payment Act 2009 (SA) (**Act**). That section permits an adjudicator to correct a determination if it contains:

1 a clerical mistake;

2 an error arising from an accidental slip or omission;

3 a material miscalculation of figures or a material mistake in the description of a person, thing, or matter referred to in the determination; or

4 a defect of form.

The adjudicator declined to exercise this discretion, stating that he had not made an error as HYLC had failed to put the larger amount of liquidated damages in issue in its payment schedule, instead applying the figure of $4,420,873 in its calculations. HYLC applied for review in the Supreme Court, arguing that:

1 the criteria in section 22(5) are jurisdictional facts, and the Court could determine whether the jurisdiction under section 22(5) was enlivened;

2 the adjudicator committed a jurisdictional error in declining to exercise the jurisdiction conferred by section 22(5) of the Act; and

3 the decision was so unreasonable that no reasonable decision-maker in the position of the adjudicator could have made it.

Decision

Jurisdictional fact

Lovell J confirmed that a jurisdictional fact is a *"criterion the satisfaction of which enlivens the exercise of the statutory power or the discretion in question"*,[1] and that characterisation of facts as jurisdictional is a matter of statutory interpretation.

His Honour held that the criteria in section 22(5) are not jurisdictional facts. The proper construction of section 22(5) is that the discretion to correct a determination is enlivened either by the adjudicator of their own volition, or by a party applying to the adjudicator to correct the determination. If the adjudicator declines to make any correction, then the error (if any) will be within jurisdiction.[2] In making this finding, Lovell J agreed with the approaches taken in *Musico v Davenport* and *Uniting Church in Australia Property Trust (Qld) v Davenport*[3] in respect of equivalent provisions in New South Wales and Queensland respectively.[4]

Jurisdictional error

Even assuming that the criteria in section 22(5) were jurisdictional facts, Lovell J found that there would not have been jurisdictional error. His Honour stated that what was in issue before the adjudicator was critical to this application. The adjudicator determined that only $4,420,873 was put in issue on the question of liquidated damages.

HYLC submitted that the adjudicator had made a specific finding that HYLC had put in dispute the full amount of liquidated damages, and made an error by using the lesser sum of $4,420,873 in his calculations. HYLC therefore argued the adjudicator had jurisdiction to apply section 22(5) of the Act and his decision not to correct his "error" was one infected by jurisdictional error.

Lovell J rejected HYLC's submissions and found that the adjudicator was correct in determining that HYLC had put in issue only the sum of $4,420,873 for liquidated damages (because it failed to include the additional $2,063,074 in the "Scheduled Amount" as defined in the Act). Therefore, the adjudicator had not committed a jurisdictional error.

Unreasonableness

Having decided that the adjudicator was correct in determining that HYLC had put in issue only the sum of $4,420,873 for liquidated damages, the Court found that there was no unreasonableness in the adjudicator's decision.

http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/sa/SASC/2018/158.html

1 At [13], quoting *Gedeon v Commissioner of the New South Wales Crime Commission* (2008) 236 CLR 120 at [43]
2 At [34]
3 [2003] NSWSC 977
4 [2009] QSC 134

Mann v Paterson Constructions Pty Ltd [2018] VSCA 231

CORRS PROJECTS UPDATE

Key takeaways

Despite continuing criticisms that a builder should not be entitled to claim a quantum meruit where an owner has repudiated a building contract, the Victorian Court of Appeal has reaffirmed that if this century-old remedy is to be overturned, only the High Court may do it.

Until then, a builder is entitled to claim for quantum meruit and this will be calculated as the fair value of the work performed. The amount may exceed actual costs and the contract price.

Further, the Court of Appeal confirmed that where variations have been ordered, owners cannot rely on section 38 of the Domestic Building Contracts Act 1995 (Vic) to restrict builders' right to claim restitutionary quantum meruit.

Keywords:

Quantum meruit

Facts

In March 2014, Peter and Angela Mann engaged Paterson Construction Pty Ltd (**PCPL**) to build two units. The contract, a "major domestic building contract", was subject to the Domestic Building Contracts Act 1995 (Vic) (**DBCA**).

The units were close to completion when a dispute arose over payments, among other things. The Manns purported to terminate, and the parties accused one another of wrongful repudiation. PCPL sued in the Victorian Civil and Administration Tribunal (**VCAT**) to recover payment on a quantum meruit basis for the work completed.

VCAT decision

The Senior Member found that the Manns had wrongfully repudiated the contract, and that PCPL was entitled to recover payment for the works completed, on a quantum meruit basis.

Supreme Court decision

The Manns sought leave to appeal on two questions of law, namely that VCAT had:

(i) misunderstood or misapplied the principles relating to the calculation of quantum meruit; and

(ii) erred in allowing PCPL to recover a quantum meruit for variations.

Cavanough J granted leave to appeal, but ultimately held that the Senior Member had not erred.

Supreme Court of Appeal decision

In the current proceeding, the Manns sought leave to appeal on four grounds, being that:[1]

(i) Cavanough J erred in holding that VCAT had applied the correct legal principles (**ground 1**);

(ii) the proceeding was a "particularly good opportunity" for the Court to reconsider the principle that a builder can accept repudiation and claim quantum meruit (**ground 2**); and

(iii) Cavanough J erred in finding that section 38 of the DBCA did not prevent recovery for variations on a quantum meruit basis (**grounds 3 and 4**).

Leave to appeal was granted for grounds 1, 3 and 4, however the appeal was ultimately dismissed.[2]

Ground 1 — assessment of the value of work in a quantum meruit claim

The Court of Appeal confirmed that the prevailing Victorian authority where the builder has accepted the owner's wrongful repudiation of the contract and elected to claim restitutionary quantum meruit is *Sopov v Kane (No 2)*.[3]

Consistent with *Sopov (No 2)*, the test to be applied for the calculation of quantum meruit is *"the value of the benefit conferred on the owner by the work that the builder performed"*, which means the *"fair and reasonable value"* of the work.[4]

The Court of Appeal also referred to additional case law, which similarly confirmed that while the actual costs incurred may be relevant, the assessment should not be confined to this factor alone.[5] The Court noted that the award for quantum meruit may well exceed the actual costs incurred, and also the contract price.

Ground 2 — availability of quantum meruit as a remedy

While the Court recognised the "growing chorus of criticism" with respect to the availability of quantum meruit as a remedy in these circumstances, their Honours ultimately concluded that they were bound by a long history of case law.[6] The Court stated that in the absence of a submission from the Manns that the history of case law was plainly wrong, no occasion arose for the Court to consider the correctness of the cited cases. However, interestingly, the Court did state in obiter that it *"endorse[d] the observations made by this court in Sopov"* with respect to the criticism surrounding the availability of quantum meruit.[7]

Grounds 3 and 4 — The effect of s 38 on variation claims

Finally, the Court of Appeal was asked to determine whether section 38 also extended to a builder's claim in quantum meruit for variations to the initial scope, where the builder had accepted the owner's repudiation.[8] The Court considered whether the work that involved a "departure from the plans and specifications set out in the contract" was affected by section 38 of the DBCA. Section 38 provides that for variations worth more than 2% of the contract price, the builder cannot recover for the variation unless it gave notice in advance of performing the variation and in accordance with the section. In this case, the Manns ordered 42 variations across the two units.

The Court of Appeal agreed with Cavanough J's ultimate conclusion that on its proper statutory interpretation, section 38 did not apply to the assessment of quantum meruit claims. However, their Honours stated that in their opinion, the contextual indications[9] in the DBCA were merely neutral or slightly favourable to that conclusion.[10] Rather, their Honours reasoned that the purpose of section 38,[11] together with the principle of legality, favoured the interpretation that section 38 should *"not be construed as abrogating … or significantly narrowing"* a builder's right to claim quantum meruit where the owner is at fault.[12]

http://classic.austlii.edu.au/au/cases/vic/VSCA/2018/231.html

On 14 December 2018, the High Court granted special leave to appeal. The central question is whether a contractor that has accepted a principal's repudiation may elect to be paid on a quantum meruit basis for the work done. Corrs will continue to report on the progress of the case.

1 [2018] VSCA 231 at [8]
2 At [9]
3 At [45]–[46], citing *Sopov v Kane Constructions Pty Ltd (No 2)* (2009) 24 VR 510
4 At [69]
5 At [48]–[49], citing *Vasco Investment Managers Ltd v Morgan Stanley Australia Ltd* (2014) 08 IPR 52; *Eddy Lau Constructions Pty Ltd v Transdevelopment Enterprise Pty Ltd* [2004] NSWSC 73
6 At [90]–[97]
7 At [97], citing *Sopov v Kane (No 2)* (2009) 24 VR 510 at [9]–[12]
8 At [130]
9 DBCA sections 16, 53 and 133
10 At [137]; compare *Mann v Paterson Constructions Pty Ltd* [2018] VSC 119
11 To protect owners from being liable for variations where builders do not provide sufficient information
12 At [138], [142]–[144]

Clack v Murray
[2018] WASCA 120

CORRS PROJECTS UPDATE

Key takeaways

A valuer may rely on reasonable non-specific hearsay evidence formed from their own knowledge and experience..

Keywords:

Valuers, hearsay evidence

Facts

The Clacks conducted business under the company MyPortfolio, which marketed refurbished apartments to Western Australian investors. The Murrays approached MyPortfolio to purchase an apartment in Palm Cove, Queensland, for $350,000. MyPortfolio made various fraudulent misrepresentations and negligently failed to advise of risks, inducing the Murrays to purchase the apartment.

The trial judge found that the Murrays acted in reliance on the misrepresentations and fraud and awarded damages. The damages were to be calculated as the difference between the price the Murrays paid for the apartment and its true value at the time they contracted to buy the apartment.

The Murrays engaged Mr Myers to lead evidence at trial of the true value of the apartment at the time of purchase. Mr Myers was a qualified and registered valuer. He relied on five completed sales of apartments in Palm Cove from 1 September 2008 to 20 February 2009 which he considered to be comparable, each proven by direct evidence.

Counsel for the Clacks presented Mr Myers with transactions relating to other sales of Palm Cove apartments by development agencies, demonstrating a higher selling price than was reflected in Mr Myers's valuation. Mr Myers considered the presented transactions 'outliers' based on his experience. Consequently, Mr Myers did not consider the transactions comparable and his assessment of the true value of the apartment was $308,200. At trial, this resulted in damages of $37,620.[1]

The Clacks appealed to the Court of Appeal on the basis that Mr Myers' evidence was inadmissible because his opinion that the transactions presented to him by the Clacks' counsel were outliers was based on "non-specific hearsay" and information gained from his own general knowledge and experience, and was unsupported by direct evidence.

Court of Appeal decision

Martin CJ, Buss P and Martin JA heard the appeal and issued a joint judgment. The Court had to determine whether a valuer could rely on their knowledge and experience unsupported by direct evidence. The Court drew on the comments of Megarry J in *English Exporters (London) Pty Ltd v Eldonwall Ltd*:

> *"As an expert witness, the valuer is entitled to express his opinion about matters within his field of competence. In building up his opinions about values, he will no doubt have learnt much from transactions in which he has himself been engaged ... But he will also have learned much from many other sources, including much of which he could give no first-hand evidence."*[2]

This was further supported by the decision in *Wright v The Municipal Council of Sydney*, where Sly J commented:

> *"An expert in land values can in my opinion give evidence that he has experience of sales in the district, and also that he has kept in touch with sales not made by himself in the district, to show that he is competent to give evidence as to value in the particular case."*[3]

Mr Myers had relied on his 15 years of experience as a valuer in which he had conducted more than 200 valuations, his understanding of Palm Cove market trends, and information gained from files in his firm. The Court was satisfied that Mr Myers' reliance on "non-specific hearsay" — which led him to conclude that the other transactions put to him by the Clacks' counsel were not comparable — was valid and reasonable. Therefore, the original order for damages was upheld.

https://ecourts.justice.wa.gov.au/eCourtsPortal/Decisions/DownloadDecision/48a63d91-e460-4241-9cba-40cca6c2c2b3?unredactedVersion=False

1 In short, the calculation was: $350,000 minus $308,200 = $41,800, reduced by 10% for the Murrays' contributory negligence = $37,620
2 (1973) 1 Ch 415 at 420
3 (1916) 16 SR (NSW) 348 at 359

Samsung C&T Corporation v Duro Felguera Australia Pty Ltd [2018] WASCA 27;

Duro Felguera Australia Pty Ltd v Samsung C&T Corporation [2018] WASCA 28

CORRS PROJECTS UPDATE

Key takeaways

An adjudicator does not have jurisdiction to determine anything other than a *"payment dispute"* in respect of *"construction work"*. Adjudicators will commit jurisdictional error if they determine a payment dispute in respect of non-*"construction work"*.

In determining the merits of a payment claim, an adjudicator must assess any relevant set off or other defence, including set off in respect of a prior payment claim which is raised as a defence.

Where a part of a determination is infected by jurisdictional error, it may be severable from the parts of the determination that are within jurisdiction.

Keywords:

Construction Contracts Act 2004 (WA), judicial review, set-off

Facts

Both decisions originate from a subcontract under which Samsung engaged Duro to perform works on the Roy Hill Iron Ore Project. The critical facts from these complex disputes are as follows:

1. Samsung disputed Duro's entitlement to payment for work performed between approximately November 2015 and February 2016. Duro applied for the disputes to be adjudicated under the Construction Contracts Act 2004 (WA) (**CCA**);
2. over five determinations, four adjudicators had determined that Samsung was liable to pay Duro more than $60 million;
3. Duro commenced proceedings to enforce the determinations. Samsung, in turn, commenced judicial review proceedings challenging the validity of the determinations, including on the ground that the determinations (incorrectly) included components relating to works outside the statutory definition of "construction work";
4. on 14 October 2016, Beech J in the Supreme Court granted Duro leave to enforce three of the determinations (the first, fourth and fifth determinations), but set aside two of the determinations (the second and third determinations) for jurisdictional error;[1] and
5. Samsung and Duro, each dissatisfied with the first instance decision, appealed to the Court of Appeal.

Samsung v Duro [2018] WASCA 27 — Grounds of appeal

Samsung's appeal sought to impugn the first and fifth determinations. The trial judge concluded that each adjudicator:

- erred by characterising non-"construction work" (work properly the subject of the "mining exclusion" in section 4(3) of the CCA) as *"construction work"*; but
- the error was not one of jurisdiction, but rather was made in the exercise of the adjudicator's function under section 31(2)(b) of the CCA, with the effect that neither determination was invalid.

Samsung argued that the adjudicators:

- lacked jurisdiction to determine a dispute arising from a claim for payment if any of the work the subject of the claim for payment is not "construction work" within the meaning of section 4 of the CCA (**ground 1**); and
- in the alternative, exceeded their jurisdiction by erroneously including within their determinations amounts relating to non-*'construction work'* (**ground 2**).

By majority (Buss P and Murphy JA; Martin CJ dissenting), the Court of Appeal agreed with ground 2, but not ground 1.

Reasoning

The CCA applies to "construction contracts",[2] which are contracts under which a person has an obligation to carry out, or supply goods or services relating to, "construction work".[3]

Despite argument to the contrary, the Court of Appeal had little difficulty in concluding that a contract for both "construction work" and non-"construction work" is a "construction contract" within the meaning of the CCA. As Buss P and Murphy JA observed:

> *"There may be some cases (and this is one) where, under the umbrella of the one contract, a person has undertaken (1) 'obligations' to carry out construction work, or supply goods or services 'related to' construction work, as well as (2) the performance of other contractual duties. Such a contract (which may be referred to as an 'umbrella contract') would fall within the terms of the definition of 'construction contract' by reason of the former of those two matters."*[4]

The dispositive component of the Court of Appeal's decision[5] turned on whether and, if so, to what extent, an adjudicator has jurisdiction to determine the merits of a dispute arising from a claim for payment for both "construction work" and non-"construction work".

The Court of Appeal focused on the operation of section 31(2) of the CCA.

Samsung's primary submission was that under section 31(2)(a)(ii) of the CCA, an adjudicator must dismiss any application for adjudication of a dispute arising from a claim for payment for both "construction work" and non-"construction work". Samsung relied, to that end, on the following logic: (1) section 31(2)(a)(ii) of the CCA requires an adjudicator (before embarking upon a determination of the merits) to determine whether there is a "payment dispute"; and (2) a dispute arising from a claim for payment for both "construction work" and non-"construction work" is not a "payment dispute".[6]

The Court of Appeal did not accept Samsung's primary submission, holding that the operative words of section 32(2)(a)(ii) of the CCA *"are clearly directed to compliance with the form and service requirements imposed by s 26 [of the CCA]"*, and not the existence of a "payment dispute".

Samsung's alternative submission[7] (which the Court of Appeal allowed, by 2:1 majority) was that an adjudicator will commit jurisdictional error if, in the course of determining a "payment dispute", they purport to determine a dispute arising from a claim for payment for non-"construction work".

Buss and Murphy JA (in the majority) held that the CCA does not confer on an adjudicator jurisdiction to determine a dispute *"which is not, in point of law, a 'payment dispute' within the meaning of the [CCA]"*.[8] Buss and Murphy JA said of adjudication applications which seek payment for both "construction work" and non-"construction work":

"even though there will be no dismissal under s 31(2)(a)(i) in such a case, the absence of dismissal cannot be tantamount, in addition, to an implied conferral of jurisdiction to determine a claim for payment with respect to other contractual duties (which may, for present purposes, be called a 'non-payment claim'). That is because, under s 31(2)(b), when read in the context of s 25 and pt 3 as a whole, an adjudicator has no jurisdiction to determine any dispute other than a 'payment dispute'. There is no power under s 31(2)(b) to determine the underlying 'merits' of a dispute involving a 'non-payment claim'."[9]

Duro v Samsung [2018] WASCA 28 — Grounds of appeal

Duro's appeal sought to impugn the trial judge's decision with respect to the second and third determinations. At first instance, Beech J held:

- regarding the second determination, that the adjudicator exceeded his jurisdiction by deciding Samsung was not entitled to set off an amount of $6.6 million which Samsung had paid on account because Samsung had wrongly withheld an amount of $13.2 million from a payment previously due to Duro;[10] and
- regarding the third determination, that the adjudicator committed jurisdictional error in ordering that a $34 million amount was payable to Duro, and that the remaining components of the determination (which were not erroneous) could not be severed, so the entire determination was void.[11]

Duro appealed on two grounds, arguing that:

- the second determination was within the jurisdiction conferred upon the adjudicator by the CCA (**Set-off Issue**); and
- the trial judge erred in finding that severance of the other amounts that Samsung was ordered to pay Duro was not permissible (**Severance Issue**).[12]

Duro's appeal was wholly successful. The Court of Appeal unanimously found in Duro's favour on the Set-off Issue, with Buss P and Murphy JA finding in Duro's favour on the Severance Issue (with Martin CJ dissenting).

Set-off Issue

In the second determination, the adjudicator accepted that Samsung had made an advance payment of $6.6 million on account to Duro, but determined that Samsung was not entitled to set off that amount against Duro's November progress claim, which was the relevant payment claim. The adjudicator reasoned that because Samsung had wrongfully set off $13.2 million for liquidated damages against Duro's October 2015 progress claim, Samsung was not entitled to further set off the $6.6 million.

Beech J held that *"the adjudicator was not empowered … to apply his conclusion that Samsung was not entitled to a set-off for liquidated damages to Samsung's response to an earlier, separate payment claim, and then to credit Duro with the amount of that 'wrongful' set-off against Samsung's right to credit for its payment on account."*[13]

Drawing support from *Alliance Contracting Pty Ltd v James*,[14] his Honour was of the view that the adjudicator's function of determining the amount payable by one party to the other was not at large but was confined, relevantly, by the payment claim founding the payment dispute.[15]

Martin CJ (with whom Buss P and Murphy JA generally agreed) found the primary judge had erred, accepting the following three principal submissions advanced by Duro:[16]

- first, Samsung's entitlement to deduct the liquidated damages it had claimed against Duro was put squarely in issue by both parties.[17] Indeed, because the entitlement to deduct liquidated damages and the entitlement to set off the $6.6 million payment on account were raised as defences to Duro's claim, they were matters the adjudicator was obliged to determine;[18]
- second, in order to determine whether Samsung was liable to make a payment to Duro in respect of the November progress claim, the adjudicator needed to determine whether Samsung's payment of $6.6 million on account had in fact given rise to a credit in the balance of account between Samsung and Duro which could be set off against the amount which Duro claimed in the November progress claim;[19] and
- third, the adjudicator correctly only allowed Duro to use Samsung's wrongful withholding of $13.2 million as a shield to Samsung's claim to set off $6.6 million — not as a sword whereby Duro was entitled to payment of the difference.[20]

In so finding, Martin CJ confirmed[21] previous decisions to the effect that adjudicators are obliged to determine whether the entitlement to the payment claimed has been satisfied, either entirely or in part[22], by set-off, and that a counterclaim cannot be used as a sword resulting in a determination that money is payable to the respondent.[23]

Severance Issue

The adjudicator's third determination was that Samsung was liable to pay Duro $49.6 million, made up of three components, these being:

- an amount said by Duro to have been certified as payable by Samsung but set off in the sum of approximately $34.2 million;
- amounts claimed in respect of the "car dumper claims" totalling approximately $14.7 million; and
- part of an amount claimed for certain commissioning costs totalling approximately $0.7 million.

At first instance, Beech J held that:

- the adjudicator exceeded his jurisdiction in finding that the $49.6 million was payable to Duro because he included, in jurisdictional error, the amount of $32.4 million in his calculations; and
- the $14.7 million and $0.7 million amounts were not severable from the adjudicator's decision because the court *"has no power to substitute a different adjudicated amount to reflect that part of the amount that is unaffected by jurisdictional error"*.[24]

On appeal, Buss P and Murphy JA framed the relevant question as *"whether the [CCA], properly construed, reveals a legislative intention that an adjudicator's determination under s 31(2)(b) as recorded in or evidenced by his or her decision under s 36, is to operate as an organic and indivisible whole."*[25] Their Honours held it did not, for the following reasons:

- first, the CCA recognises the essential statutory function of the adjudicator will commonly involve the determination of identifiable, divisible, amounts;[26]
- second, sections 33 (interest) and 36(c)(i) (content of the determination) of the CCA operate on the basis that a determination may involve a determination of divisible amounts with different consequences;[27]
- third, the effective operation of sections 38 to 43 of the CCA does not depend upon an adjudicator's determination operating as an organic and indivisible whole;[28] and
- fourth, the CCA is beneficial legislation, and the decisions of adjudicators are to have the fullest operation[29], to the extent that they deal with the adjudication of a "payment dispute" within the meaning of s 31(2)(b).

Buss P and Murphy JA held (with Martin CJ dissenting) that if followed, applying the common law principles of severance, the invalid component of the determination could be severed from the remainder of the determination. This is because the invalid part of the adjudicator's determination did not influence the making, or form an integral or essential element, of the valid part of his decision.[30] Hence, certiorari was available to quash the determination with respect to the $34.2 million component of the determination, but the $14.7 million and $0.7 million amounts remained valid.

Conclusion

Samsung v Duro makes clear that adjudicators exercising jurisdiction under the CCA cannot award payment for work which does not satisfy the statutory definition of "construction work". That being the case, prospective applicants (contractors and subcontractors) should, to the extent possible, take care to clearly separate each claim item and claim amount, so that an adjudicator can distinguish between claims for payment for "construction work" and non-"construction work" in the event that a dispute reaches adjudication. While there is room for further debate on where the dividing line lies, prospective applicants should also treat with caution claims for "mixed items" (items which relate to "construction work" and non-"construction work", such as preliminaries and off-site overheads).

The good news (for applicants) is that the existence of jurisdictional error in a favourable determination does not necessarily spell complete disaster. *Duro v Samsung* clarifies that an adjudicator's determination is valid to the extent that it is possible, in accordance with common law principles, to sever any part of the determination which suffers from jurisdictional error. Respondents will, therefore, need to consider the quantum of the work the subject of a determination which (arguably) falls short of "construction work" in deciding whether to commence judicial review proceedings.

http://decisions.justice.wa.gov.au/supreme/supdcsn.nsf/judgment.xsp?documentId=F9A8517F469092F048258250000F899E&action=openDocument

http://decisions.justice.wa.gov.au/supreme/supdcsn.nsf/judgment.xsp?documentId=9D71B02386C3105548258250000B0E4C&action=openDocument

1 *Samsung C&T Corporation v Loots* [2016] WASC 330
2 CCA section 7(1)
3 CCA section 3
4 *Samsung v Duro* [2018] WASCA 27 at [172] (Buss P and Murphy JA). See also *Samsung v Duro* [2018] WASCA 27 at [13] (Martin CJ)
5 See *Samsung v Duro* [2018] WASCA 27 [72]-[90] (Martin CJ); [172]-[180] (Buss P and Murphy JA).
6 *Samsung v Duro* [2018] WASCA 27 at [73] (Martin CJ); at [169] (Buss P and Murphy JA)
7 Ironically, Samsung abandoned this argument on the second day of the hearing before the trial judge
8 *Samsung v Duro* [2018] WASCA 27 [172]–[180] (Buss P and Murphy JA)
9 *Samsung v Duro* [2018] WASCA 27 at [174]
10 *Samsung C&T Corporation v Loots* [2016] WASC 330 at [163]
11 *Samsung C&T Corporation v Loots* [2016] WASC 330 at [276]–[281]
12 *Duro v Samsung* [2018] WASCA 28 at [5]
13 *Samsung C&T Corporation v Loots* [2016] WASC 330 at [163]
14 [2014] WASC 212 at [60]
15 *Duro v Samsung* [2018] WASCA 28 at [12] and [276]–[277]
16 *Duro v Samsung* [2018] WASCA 28 [18]
17 *Duro v Samsung* [2018] WASCA 28 [17]
18 *Duro v Samsung* [2018] WASCA 28 at [34]
19 *Duro v Samsung* [2018] WASCA 28 at [17]
20 *Duro v Samsung* [2018] WASCA 28 at [17]
21 *Duro v Samsung* [2018] WASCA 28 at [36]
22 *Zurich Bay Holdings Pty Ltd v Brookfield Multiplex Engineering and Infrastructure Pty Ltd* [2014] WASC 39 at [22]; *Alliance Contracting Pty Ltd v James* [2014] WASC 212 at [50]–[76]; *Cooper & Oxley Builders Pty Ltd v Steensma* [2016] WASC 386 at [22]. This is also consistent with the Supreme Court of Western Australia's recent decision in *Total Eden Pty Ltd v Charteris* [2018] WASC 60 [55]–[61]
23 *Alliance Contracting Pty Ltd v James* [2014] WASC 212 at [50]–[76]; *Cooper & Oxley Builders Pty Ltd v Steensma* [2016] WASC 386 at [21]
24 *Samsung C&T Corporation v Loots* [2016] WASC 330 at [416]
25 *Duro v Samsung* [2018] WASCA 28 at [140]
26 *Duro v Samsung* [2018] WASCA 28 at [144]. In relation to this point, Buss P and Murphy JA highlighted that the *"The phrase 'payment of an amount'* [in the definition of 'payment claim'] *is apt to include a reference to payment of 'amounts'"* by operation of s 10(c) of the *Interpretation Act 2004* (WA) (which provides that *'words in the singular number include the plural and words in the plural number include the singular'*)".
27 *Duro v Samsung* [2018] WASCA 28 at [147] (Buss P and Murphy JA)
28 *Duro v Samsung* [2018] WASCA 28 at [148] (Buss P and Murphy JA)
29 *Duro v Samsung* [2018] WASCA 28 at [149] (Buss P and Murphy JA)
30 *Duro v Samsung* [2018] WASCA 28 at [150] (Buss P and Murphy JA)

Duro Felguera Australia Pty Ltd v Trans Global Projects Pty Ltd (in liq) [2018] WASCA 174

CORRS PROJECTS UPDATE

Key takeaways

The Western Australian Court of Appeal has broadened the power that Australian courts have when granting freezing orders as interim measures in arbitral proceedings under the *International Arbitration Act 1974* (Cth).

Australian courts have the power to grant a freezing order before an arbitral tribunal is constituted. The order may extend beyond the constitution of the arbitral tribunal whether or not the arbitral tribunal agrees that it is appropriate.

Keywords:

Freezing orders in international arbitration

Facts

In May 2014, Duro Felguera Australia Pty Ltd (**Duro**) and Trans Global Projects Pty Ltd (**TGP**) entered into a subcontract under which TGP would transport processing facility components for the Roy Hill Iron Ore Project. By May 2015, Duro and TGP had substantial claims against each other (totalling $56 million).

On 19 June 2015, TGP served a notice of reference to arbitration under the International Arbitration Act 1974 (Cth) (**IAA**). TGP was placed into voluntary administration one month later (on 30 July 2015) and then into liquidation (on 15 September 2016).

In April 2018, TGP's liquidators notified their intention to pursue TGP's claims under the subcontract and sought an undertaking from Duro that it would not deal with its assets. Duro refused to give an undertaking. TGP subsequently applied for a freezing order against Duro, in relation to the prospective judgment enforcing the arbitral award that TGP hoped to obtain against Duro. The primary judge granted the freezing order.[1] Duro appealed on two grounds:

1. that the primary judge erred in fact and law in finding that the requirements of Order 52A rule 5 of the Rules of the Supreme Court 1971 (WA) (**Rules**) were satisfied; or
2. in the alternative, that the primary judge erred in making the freezing order operative "until further order".

Issue in dispute

The Court of Appeal faced two questions:

1. whether there was a real danger that a prospective judgment on an arbitral award would be wholly or partly unsatisfied because Duro's assets would be removed from Australia or otherwise disposed of; and
2. whether any freezing order should have operated only until the arbitral tribunal had been constituted and had had a reasonable opportunity to consider for itself whether to grant relief equivalent to a freezing order.

Decision

The Court held that neither ground could be established and therefore dismissed the appeal.

Ground 1

The Court confirmed that the courts' power to grant a freezing order derives from two concurrent sources.[2]

The first is found in the UNCITRAL Model Law on International Commercial Arbitration (**Model Law**), which applies pursuant to section 16 of the IAA. Article 17J of the Model Law states:

> *"A court shall have the same power of issuing an interim measure in relation to arbitration proceedings, irrespective of whether their place is in the territory of the State, as it has in relation to proceedings in courts. The court shall exercise such power* ***in accordance with its own procedures*** *in consideration of the specific features of international arbitration."*[3]

The second source of power is the inherent or implied power of the court to grant a freezing order *"to prevent the abuse or frustration of its process in relation to matters coming within its jurisdiction"*.[4] This power extends to the enforcement of arbitral awards under Article 35(1) of the Model Law.[5]

The Court held that Order 52A of the Rules applies to the exercise of both of the court's concurrent powers to grant a freezing order. In requiring the court to exercise its power "in accordance with its own procedures", Article 17J of the Model Law picks up the provisions of Order 52A of the Rules.[6]

In order to grant a freezing order in accordance with Order 52A rule 5(r) of the Rules, the court must be satisfied of three elements:[7]

1. one or more of the following events might occur:
   a. the judgment debtor, prospective judgment debtor or another person absconds; or
   b. the assets of the judgment debtor, prospective judgment debtor or another person are removed from Australia or from a place inside or outside Australia or, disposed of, dealt with or diminished in value;
2. there is a danger that a judgment or prospective judgment will be wholly or partly unsatisfied; and
3. that danger arises because one or more of the events described in (a) and (b) above might occur.

The Court found that the requirements for making a freezing order were met, as there was a real risk that Duro might act in a manner that would have the effect of frustrating a prospective order of the court and therefore prevent enforcement of any arbitral award in Australia. The Court's decision was based on the fact that Duro had a history of making loans to its parent company in Spain (among other reasons).

Ground 2

Duro submitted that any freezing order should have operated only until the arbitral tribunal was constituted and had had a reasonable opportunity to consider for itself whether to grant relief equivalent to a freezing order.

The Court disagreed on the basis of Article 9 of the Model Law, which provides that *"[i]t is not incompatible with an arbitration agreement for a party to request, before or during arbitral proceedings, from a court an interim measure of protection and for a court to grant such measure"*.[8]

While the Court acknowledged that its power to grant a freezing order should be exercised sparingly, it held that if the onerous requirements for obtaining a freezing order were satisfied, there is no reason for a court to adopt a default position that the order should only be made until the arbitral tribunal can consider the question.[9] The Court noted that this is particularly so when the enforceability of any interim measure granted by an arbitral tribunal will depend on a judgment of the court giving effect to the interim measure.[10]

The Court suggested that a court may be more reluctant to grant a freezing order where there is a serious contest as to the merits of the applicant's claim for final relief.[11] However, this was not relevant in the appeal because Duro did not appeal the primary judge's decision that TGP had "a good arguable case",[12] which is a precondition of any freezing order being made.

Ultimately, the Court held that it was open to the primary judge to grant the freezing order operate "until further order"', and his Honour did not make any error of principle in doing so.

Conclusion

This decision confirms that Australian courts have significant powers and play an important role in supporting arbitral proceedings. However, what is unclear from the decision is exactly how courts and tribunals will deal with situations where a court has granted a freezing order with which the arbitral tribunal, once constituted, disagrees.

http://classic.austlii.edu.au/au/cases/wa/WASCA/2018/174.html

This decision confirms that Australian courts have significant powers and play an important role in supporting arbitral proceedings

1 *Trans Global Projects Pty Ltd (in liq) v Duro Felguera Australia Pty Ltd* [2018] WASC 136
2 [2018] WASCA 174 at [14]
3 United Nations Commission on International Trade Law, *UNCITRAL Model Law on International Commercial Arbitration 1985: with amendments as adopted in 2006* (Vienna: United Nations, 2008), available from www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1985Model_arbitration.html (emphasis added)
4 At [18]
5 At [19]
6 At [25]
7 At [40]
8 At [150]
9 At [150]
10 At [150]
11 At [154]
12 At [29]

Global Partnership Creates Path To Power And Economic Prosperity In PNG

CORRS PROJECTS UPDATE

For too long, poor access to electricity has been a handbrake on economic and social development in Papua New Guinea. The announcement that Papua New Guinea will partner with Australia, Japan, New Zealand, and the United States to electrify the nation should enable Papua New Guinea to put its foot to the floor in pursuing its economic and social development aims.

On 18 November 2018, Papua New Guinea, Australia, Japan, New Zealand and the United States announced that they intended to join together in a "Papua New Guinea Electrification Partnership" in support of Papua New Guinea's objectives for electrification. The electrification project, which was announced during the APEC leaders' summit, has the potential to transform Papua New Guinea.

Presently only about 13% of Papua New Guinea's population of 8.5 million people have reliable access to electricity—one of the lowest rates in the region. The Papua New Guinea Electrification Partnership aims to lift that rate to 70% by 2030. That target is not new—it was a key goal set out in Papua New Guinea's Development Strategic Plan launched in 2010. The vision of the Strategic Plan was for Papua New Guinea to be a prosperous middle-income country by 2030—an ambition that will remain unrealised unless power can be delivered to the country's people.

PNG today

Papua New Guinea has one of the least urbanised populations in the world, with more than 80% of its people living in rural areas. The combination of its decentralised population and rugged topography has presented particular challenges for the country's electrification.

Papua New Guinea's installed power generation capacity (including generation by independent power providers) sat at approximately 580 MW just 18 months ago.[1] For urban populations in Papua New Guinea, grid-supplied electricity is expensive and unreliable, although in recent years it has improved considerably in the capital, Port Moresby. Many businesses invest in large back-up generators to ensure business continuity, while much of the country's rural population must rely on antiquated energy sources such as kerosene, candles and the burning of agricultural waste.

While PNG has historically been heavily dependent on diesel to generate power, more than half of PNG's current power supply comes from hydropower plants.

Getting the electricity mix right

Installed power generation and distribution capacity will need to increase significantly to achieve the goal of electricity access for 70% of the population by 2030. It will take careful planning get the mix right!

The joint announcement specifically contemplates investment in new "on grid" generation and distribution assets. There must also be a role for off grid generation and micro distribution networks to service remote rural communities which are a feature of Papua New Guinea. There will be no one solution for the entire country, but rather a range of complementary solutions and technologies including solar PV, micro-hydro, small scale LNG and waste-to-energy.

No details yet, but a few questions

Details as to how the project will be managed, delivered and funded are being worked through, with most activity in 2019 expected to involve project scoping.

The Australian Government has announced it will contribute A$25 million in project funding in 2019, against a total estimated project cost in the order of US$1.7 billion over 12 years.

We expect the scoping activities will need to consider:

- **How to encourage private investment** – there are reports that public-private partnerships will be considered. The project partners recognise the need for continued investment and improvement in institutional and regulatory frameworks to unlock private investment, which may include public-private partnerships.
- **The role of PNG Power**—PNG Power is the state-owned electricity utility, and also performs a regulatory role for the Independent Consumer and Competition Commission. Some have argued for a structural separation of PNG Power into generation, transmission and retail businesses to improve its performance and reduce conflicts of interest with new market entrants.
- **Exploitation of new technologies**—Historical under-investment ironically brings an opportunity for Papua New Guinea to embrace new electricity generation and storage technology, which may provide ideal off-grid power solutions.
- **Revenue collection**—PNG Power recognises that electricity theft is a major hindrance to meeting national targets set by the Government, with 25% of generated power being supplied free or stolen.[2]

A bright future

Improving access to electricity has long been recognised as fundamental to substantive economic and social development in Papua New Guinea. With the commitment of the electricity partners, the electrification project will pave the way for a brighter future for the citizens of Papua New Guinea.

1 The World Bank, 'Papua New Guinea Electrification Project (P159840)', *Project Information Document / Integrated Safeguards Data Sheet*, 10 April 2017 at page 5

2 "Electricity Theft is a Major Hindrance", *Post Courier*, 21 March 2018

Other recent developments

Broadley Construction Pte Ltd v Alacran Design Pte Ltd [2018] SGCA 25

Keywords:

Misunderstandings in negotiation

Key takeaways

A mistaken party is unlikely to find relief where:

- the mistaken party expresses an understanding of a negotiated position;
- the other party remains silent; and
- both parties later sign up to express written terms that contradict the first party's understanding.

The second party may assume that the first party will read the written terms prior to signing and that any misrepresentation or mistake has been corrected by the terms of the written document. This much is plain in Singapore, although the position in Australia is less clear.

Facts

In 2013, Broadley Construction Pte Ltd (**Broadley**) contracted Alacran Design Pte Ltd (**Alacran**) to provide equipment as part of the construction of a residential development project. Broadley was the subcontractor of Singbuild Pte Ltd (**Singbuild**).

After Singbuild had stopped paying Broadley, Broadley in turn began defaulting on payments to Alacran. Mr Lin (for Alacran) and Mr Govin (for Broadley) negotiated over the $423,407 Broadley owed Alacran.

In November 2015, all the parties signed a brief three paragraph undertaking (**Undertaking**) in which:

- Broadley authorised Singbuild to pay the outstanding sum to Alacran on its behalf; and
- Broadley was indemnified in relation to the outstanding sum and released from its liability to Alacran.

Singbuild failed to pay Alacran and Alacran sued Broadley for the outstanding amount. Broadley relied on the indemnity in the Undertaking.

Alacran alleged that the Undertaking was not meant to release Broadley from its obligation to pay. It alleged that Mr Lin had stated this position to Mr Govin at a meeting before the Undertaking was drafted and signed and that the Undertaking was intended to reflect the agreement at that meeting — that is, that Singbuild could pay Alacran the amount owed by Broadley.

At that meeting, Mr Lin asserted his understanding that any undertaking would not release Broadley from its obligation to pay and Mr Govin had remained silent. Mr Lin subsequently signed the Undertaking, which Broadley had drafted, and which contained the indemnity.

At first instance, the High Court of Singapore found that the Undertaking was void on the basis of both fraudulent misrepresentation and unilateral mistake whereby Mr Govin, by his silence, had misrepresented to Mr Lin that Broadley would remain liable to pay Alacran if Singbuild failed to pay.

Decision

Broadley appealed to the Singaporean Court of Appeal which affirmed the primary judge's findings of fact in favour of Mr Lin's version of events but reversed the lower court's decision regarding misrepresentation and mistake. The Court found that the Undertaking validly released and indemnified Broadley and that:

- Mr Govin's silence could not have amounted to a misrepresentation; and
- Mr Lin could not have been labouring under a unilateral mistake that Mr Govin was obliged to correct at the time the Undertaking was signed.

Fraudulent misrepresentation

Mr Govin's silence, the Court found, could not reasonably be viewed as unequivocal consent to Mr Lin's stated position that the undertaking would not include an indemnity or release, but was, at most, ambiguous.

Further, and of significance to the Court, even if a misrepresentation could be found, both parties understood that the written terms would be forthcoming. Indeed, the terms of the Undertaking were provided after the alleged misrepresentation by Mr Govin.

Broadley relied on the decision in *Peekay Intermark Ltd v Australia and New Zealand Banking Group Ltd* (**Peekay**).[1] The Court indeed cited *Peekay* for the proposition that a plaintiff would not generally be found to have been induced to enter into a contract because of a misrepresentation where the express written terms of the contract, "which the plaintiff placed importance on, read and signed, and which the defendant expected that the plaintiff would read and understand, contradict or correct the defendant's misrepresentation".[2]

Accordingly, even if Mr Govin's silence could be viewed as a representation, it was subsequently dispelled by the terms of the Undertaking itself, which were not extensive and clearly contained the indemnity releasing Broadley from its obligation to pay. In those circumstances, Alacran could not reasonably have relied on Mr Govin's earlier silence.

Unilateral mistake

While Mr Lin may have mistakenly believed, based on the prior meeting and Mr Govin's silence, that the Undertaking would not contain the indemnity, there was no evidence that Mr Govin was aware of that mistake and had an obligation to correct it at the time the Undertaking was executed. Mr Govin was entitled to assume that Mr Lin, if he was indeed mistaken, had been disabused of his mistake since Mr Lin had ample opportunity to read the terms of the Undertaking which plainly included the indemnity.

The Court noted that to find a fraudulent misrepresentation or to require Mr Govin and Broadley to have done more to clarify the terms and effect of the Undertaking would be contrary to principles of contracting and commercial practice, whereby parties could be assumed to "read and understand the contracts they choose to enter into".[3]

http://www.singaporelawwatch.sg/Portals/0/Docs/Judgments/[2018]%20SGCA%2025.pdf

The Court found that the Undertaking validly released and indemnified Broadley

1 [2006] 2 Lloyd's Law Rep 511
2 At [36]
3 At [45]

Navigating an Evolving Environmental Legislative Landscape in Western Australia

CORRS PROJECTS UPDATE

One could easily be forgiven for believing that helping the environment is only something which can be done once all governments of the world agree. However, the reality is that legislation already exists in Western Australia which deals with how businesses can (and sometimes must) do their part to protect the environment and promote sustainable development. To this end, there have been legislative developments in 2018 in WA to deal with renewable facilities, biodiversity and the use of fill in development and infrastructure projects.

Renewables by developers and landowners

Significant renewable energy facilities are now operational in Western Australia, such as the Emu Downs Solar Farm, which was formally opened in March 2018. Significantly, the solar farm will be co-located with the Emu Downs Wind Farm to significantly increase Western Australia's renewable energy capacity.[1]

The Department of Planning Lands and Heritage published a draft position statement in May 2018 dealing with renewable energy facilities. It is telling that the draft statement supersedes a planning bulletin prepared around 14 years ago, perhaps indicating not only the growth in this area, but also renewable energy being seen as less 'alternative' and more mainstream.

The draft statement focuses on the planning considerations which proponents of such facilities, and decision-makers, need to keep in mind (such as noise, safety, environmental and community impacts) when dealing with applications for planning approval of such facilities.

In the meantime, landlords are also looking to benefit by capturing solar energy from renewable energy facilities installed in their shopping centres and supplying this to tenants.[2] Helpfully, Western Australian legislation already supports this framework in the non-residential context to reduce barriers to the growth of this form of sustainable development. Indeed, the Electricity Exemption Order 2005 exempts suppliers of electricity generated from solar panels from licensing requirements where the electricity is generated and consumed in a non-residential property.

New biodiversity legislation

With the publication of the Biodiversity Conservation Regulations 2018 (WA), the Biodiversity Conservation Act 2016 (**Act**) (WA) can proceed to full proclamation. The Biodiversity Conservation Act provides a more modern approach as it will replace the Wildlife Conservation Act 1950 and the Sandalwood Act 1929. There will be a greater focus on biodiversity, including the ecologically sustainable use of native species, habitats and ecological communities.

For landowners, a new notification process will allow the Minister to notify a landowner, based on "reasonable evidence", that their land contains a "threatened species" or a "threatened ecological community". The Act facilitates a notice on title so that future purchasers are aware of the existence of the threatened species or ecological community.

The Act also sets out principles of ecologically sustainable development and significant penalties (up to $2.5 million for a corporation). However, while these provisions of the Act commence in 2019, the Environmental Protection Act 1986 (WA) already contains detailed approval procedures where a proposal will have, or is likely to have, a significant effect on the environment.

Clarification as to fill and Eclipse Resources

Legislation is dynamic and open to interpretation by the courts. Recent decisions involving Eclipse Resources[3] mean that the use of clean fill may be considered "waste" and so attract the payment of the waste levy and the need for licensing under the Environmental Protection Act.

This interpretation had significant implications for those involved in the development industry and large infrastructure projects, especially in WA where the use of "cut and fill" development is prevalent.

In response, amendments to the Environmental Protection Regulation 1987 came into effect in April 2018 to clarify the position and set out environmental thresholds for the use of clean or uncontaminated fill.

Notwithstanding this guidance, this remains a highly technical area, and given the volumes of fill that are generally used in large projects, proponents should seek environmental and legal guidance before proceeding, as well as being mindful of their obligations under the Contaminated Sites Act 2003 (WA).

1 Hon Ben Wyatt, *Emu Downs Solar Farm to power WA Households*, Media Statements, 7 March 2018
2 Su-Lin Tan, *Frasers sets up Energy Retailer Real Utilities*, Westlaw, 30 October 2018
3 *Eclipse Resources Pty Ltd v State of Western Australia* [No 4] [2016] WASC 62 and *Eclipse Resources Pty Ltd v Minister for Environment* [No 2] [2017] WASCA 90

Health and safety changes: Mines Legislation (Resources Safety) Amendment Act 2018

CORRS PROJECTS UPDATE

The Queensland parliament has passed the Mines Legislation (Resources Safety) Amendment Act 2018 (Qld) (**Act**) in a move that will strengthen the existing regulatory framework for health and safety in the mining industry.

The Act makes a number of key amendments to the Coal Mining Safety and Health Act 1999 (Qld) (**CMSHA**) and the Mining and Quarrying Safety and Health Act 1999 (Qld) (**MQSHA**), particularly in terms of officers' duties, penalties for non-compliance, greater inspection powers and improved health surveillance in the industry.

Changes include:

Positive duty on officers

Under the new provisions, officers of a corporation have a positive duty to exercise due diligence so as to ensure legislative compliance, bringing the CMSHA and MQSHA into line with equivalent provisions in the *Work Health and Safety Act 2011* (Qld) (**WHSA**).

Officers can be convicted of an offence, irrespective of whether the corporation is also convicted or found guilty.

These provisions reflect a deliberate policy shift to impose a positive, proactive duty on officers to ensure compliance and therefore complement the obligations that currently rest primarily with the Site Senior Executive (**SSE**).

Increases to maximum penalties

Maximum penalties for failure to discharge obligations have increased. By way of example:

- *Where a breach caused multiple deaths*, a corporation will now face a maximum fine of $3,916,500, and an officer a maximum fine of $783,300 or three years imprisonment; and
- *Where a breach caused death or grievous bodily harm*, a corporation will now face a maximum fine of $1,958,250, and an officer a maximum fine of $391,650 or 2 years imprisonment.

Ability to impose civil penalties

The chief executive of the Department of Natural Resources, Mines and Energy (**chief executive**), is now able to impose civil penalties on corporations for non-compliance with its obligations.

Procedurally, the chief executive must first provide the corporation with a notice setting out details such as facts and grounds and the proposed penalty, following which the corporation has an opportunity to respond.

Any subsequent decision by the chief executive to impose a penalty must be communicated in writing, including reasons. Corporations aggrieved by a decision can appeal to the Industrial Court.

Civil penalties cannot be ordered after a successful conviction. They can however be instituted if the criminal proceeding ends without the corporation being convicted or found guilty.

The Act provides for three categories of civil offences and a maximum penalty depending on the nature and gravity of the safety and health risk. The maximum penalty amounts vary from $130,550 for a category one offence to $65,275 for a category three offence.

Right of entry by inspectors

The Act closes a number of legislative gaps regarding entry by inspectors to workplaces outside of the mining lease.

Entry powers will now operate to enable inspectors to enter any workplace that has the potential to affect the health and safety of workers at a mine.

Safety and health management systems (SHMS)

Contractors and service providers are required to provide a copy of their safety and health management plan to the SSE for consideration and integration (as appropriate) into the mine's SHMS.

In conjunction, SSEs are required to keep and administer a single, integrated SHMS.

The policy objective is to improve collaboration between contractors, service providers and the relevant SSE, so as to facilitate a single, integrated SHMS at each mine for all mine workers.

Ventilation officer competencies

Amendments have been made to improve standards of proficiency for ventilation officers.

Access to information about holders of certificates etc

A single register of holders of certificates of competency, SSE notices and other relevant notices is to be established and administrative red tape has been cut to enable access to this information by mine operators and SSEs.

Broader reporting requirements

Designers, manufacturers, importers and suppliers have an obligation to notify the Mines Inspectorate and mine operators when they become aware of hazards or defects in supplied equipment and substances that may cause unacceptable levels of risk.

Release of safety information

The Act strengthens provisions enabling timely release of safety information by regulators (eg safety alerts about incidents) in an effort to improve practices after such incidents.

Notification of diseases

Following recent legislative amendments in relation to pneumoconiosis, medical officers now owe a duty to notify reportable diseases, complementing the existing duty applicable to SSEs.

Health surveillance

The Act includes provisions to emphasise ongoing health surveillance of workers in the mining industry, both past and present.

Implementation

The Act commenced on 9 November 2018. It provides for a transitional period of three years during which certain provisions relating to the appointment of ventilation officers under the CMSHA and MQSHA will not apply. The Act similarly provides for a transitional period of one year, during which certain provisions relating to the appointment of site senior executives under the MQSHA will not apply.

The Act otherwise came into force on 9 November 2018.

In summary, the amendments bring greater alignment between the mines safety legislation and model workplace health and safety laws and strengthen the regulatory framework for health and safety in the mining industry. Mine operators, SSEs and officers of corporations should familiarise themselves with the changes and ensure they comply with them.

Industrial Relations – Ongoing industrial uncertainty on the West Gate Tunnel Project

CORRS PROJECTS UPDATE

Tensions remain on the West Gate Tunnel Project (**Project**), a major Victorian road project, arising from uncertainty over on-site terms of employment.

Key points

- Uncertainty remains over the terms of employment for the principal contractor's employees who will work on the West Gate Tunnel Project, and site allowances for certain subcontractors. Work on the Project (following completion of early works) is due to commence in early 2019.
- A determination on the powers of the Fair Work Commission (**Commission**) with respect to establishing site allowances will have broader implications for industry participants covered by similar enterprise agreements. Most of these enterprise agreements have nominal expiry dates of 30 June 2018 and the Commission's decision is also likely to inform bargaining for replacement agreements.
- The outcome of applications for greenfields agreements to cover the Project may operate as a test case on the (relatively) new provisions in the Fair Work Act 2009 (Cth) that permit an employer to apply for approval of a greenfields agreement without union agreement after the 6-month notified negotiation period expires.

The Commission's jurisdiction to determine site allowances

Current proceedings in the Commission cast doubt on the capacity of the Victorian Building Industry Disputes Panel (**Panel**) to establish site allowances in accordance with common terms found in enterprise agreements covering the construction industry in Victoria.

On 20 July 2018, the Panel determined that a site allowance of $8.90 be paid to employees who perform work on the Project under the terms of certain standard industry enterprise agreements.[1] The Panel's decision also established site allowances for various subcontractors on the Metro Tunnel Project, but only the Panel's decision in respect of the West Gate Tunnel Project has been appealed to the Commission.

Wagstaff Piling applied to the Commission for a "review" of the Panel's decision in accordance with the terms of its enterprise agreement, the *Wagstaff Piling Pty Ltd and the CFMEU (Victorian Construction and General Division) Piling Agreement 2016 – 2018* (**Wagstaff Agreement**). The Construction, Forestry, Maritime, Mining and Energy Union (**CFMMEU**) objected to the application. The matter proceeded by way of hearing on a jurisdictional point only. Directions for a hearing on the substantive issue have been deferred pending resolution of the CFMMEU's jurisdictional objection.

On 16 November 2018, Deputy President Masson determined that under clause 10.4(e) of the Wagstaff Agreement, the Commission has jurisdiction to review the Panel's decision by way of a hearing "de novo".[2] This empowers the Commission to determine the appropriate site allowance for itself under the terms of the disputes procedure contained in the Wagstaff Agreement. The review is not confined to circumstances where the Panel has made an error, by, for example, taking into account an irrelevant matter or failing to consider a relevant matter.

The CFMMEU has appealed the decision of Deputy President Masson and the matter is listed for hearing before a Full Bench of the Commission on 18 December 2018.

Greenfields agreements for the head contractor on the Project

Ongoing negotiations involving various unions and the principal contractor (a joint venture between CPB and John Holland) have not resulted in agreement on the terms for their employees carrying out works on the Project.

On 9 November 2018, the joint venture lodged two applications in the Commission to approve two greenfields enterprise agreement covering tunnelling and surface works respectively, relying upon provisions under the Fair Work Act 2009 (Cth) that permit an employer to apply to the Commission to approve a proposed greenfields agreement where the parties do not reach an agreement by the end of the notified 6 month negotiation period.[3]

The unions oppose the applications on various grounds and the matter is listed for hearing in the Commission on 9 January 2019.

In considering whether to approve an agreement made in these circumstances, the Commission must be satisfied (amongst other things) that the *"agreement, considered on an overall basis, provides for pay and conditions that are consistent with the prevailing terms and conditions within the relevant industry for equivalent"* work.

The Commission's approach to identifying such industry standards is untested given that all previous applications made under these provisions ultimately resulted in negotiated outcomes.

Meanwhile, a greenfields agreement for the principal contractor on the Metro Tunnel project, Cross Yarra Partnership (a joint venture between John Holland, Lendlease Engineering and Bouygues Construction), endorsed by both the CFMMEU and AWU was approved by the Commission on 22 November 2018.[4]

It remains to be seen to what extent this agreement might be regarded as establishing relevant industry standards for approval of the agreements covering the Project.

1 Matter No 008-2018
2 *Wagstaff Piling Pty Ltd T/A Wagstaff Piling v Construction, Forestry, Maritime, Mining and Energy Union* [2018] FWC 6626
3 Sections 182(4) and 187(6). Refer to AG2018/6254 in respect of the application to approve the *West Gate Tunnel Project (Tunnelling) Greenfields Agreement 2018* and AG2018/6255 in respect of the application to approve the *West Gate Tunnel Project (Civil Surface Works) Greenfields Agreement 2018*
4 See the *Melbourne Metro Tunnel and Stations Project Greenfields Agreement 2018-2012* (AG2018/6291)

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